95-1089

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE PITTSTON COMPANY and
CLINCHFIELD COAL COMPANY,

Petitioners,

v.

BRUCE BABBITT, Secretary, United States Department of Interior, and
COMMONWEALTH OF VIRGINIA, Department of Mines, Minerals & Energy, Division of Mined Land Reclamation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether United States district courts outside the District of Columbia have jurisdiction to review mining regulations – as promulgated or as applied – by the Secretary of Interior under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328.

RULE 29.6 STATEMENT

Petitioner The Pittston Company is parent company of petitioner Clinchfield Coal Company. The Pittston Company is a publicly traded company, listed on the New York Stock Exchange as Pittston Minerals and Pittston Services.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, The Pittston Company and Clinchfield Coal Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on October 6, 1995, rehearing denied on December 11, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported, *Pittston Coal Co. v. Babbitt*, 66 F.3d 714 (4th Cir. 1995),[1] and reprinted in the Appendix, *infra*, 1a.

The memorandum opinion of the United States District Court for Western District of Virginia dismissing for lack of subject matter jurisdiction is reported, *Pittston Co. v. Lujan*, 798 F. Supp. 344 (W.D. Va. 1992), and reprinted in the Appendix, *infra*, 4a. The earlier memorandum opinions of the District Court granting preliminary injunctive relief are not reported, but they are reprinted in the Appendix, *infra*, 29a, 32a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on October 6, 1995. App.,

[1] The opinion of the Court of Appeals is incorrectly styled, listing the appellant as "Pittston *Coal* Company" instead of "Pittston Company."

infra, 1a. Petitioners timely filed a petition for rehearing, which was denied on December 11, 1995. App., *infra*, 42a. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Under Article III, Section 2, Clause 1, of the Constitution of the United States,

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

Under 28 U.S.C. § 1331, district courts have jurisdiction to decide federal questions:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In 30 U.S.C. § 1276(a), Congress provided for judicial review in certain cases arising under the Surface Mining Control and Reclamation Act of 1977. In dismissing petitioners' action, the courts below relied on the following provision from that section:

> Any action by the Secretary [of Interior] promulgating national rules or regulations . . . shall be subject to judicial review in the United States District Court for the District of Columbia.

Due to their length, other statutes and regulations relevant to this controversy – 30 U.S.C. § 1260(c) and 30

C.F.R. §§ 773.5, 773.15(b) – have been reprinted in the Appendix, *infra*, 44a, along with the full text of 30 U.S.C. § 1276(a).

STATEMENT OF THE CASE

Petitioner, The Pittston Company, through its subsidiaries, including Clinchfield Coal Company (collectively "Pittston"), is engaged in the business of mining coal in Virginia and adjacent states. Pittston's mines – both underground and surface – are subject to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201-1328, and corresponding state acts, *e.g.*, the Virginia Coal Surface Mining Control and Reclamation Act of 1979, Va. Code Ann. §§ 45.1-226 to -270.7 (Repl. Vol. 1994). Among other things, these laws require that an operator have a permit before mining and impose elaborate requirements for issuance of permits. 30 U.S.C. § 1256; Va. Code Ann. § 45.1-234 (Repl. Vol. 1994).

In 1991, Pittston filed this action against respondents in the United States District Court for the Western District of Virginia seeking to enjoin respondents from unlawfully "blocking," i.e., barring the issuance of, new mining permits to Pittston. App., *infra*, 51a. Pittston invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 and 30 U.S.C. § 1276. App., *infra*, 16a, 17a. Although the District Court concluded that the respondents' actions violated due process, it dismissed the case for lack of subject matter jurisdiction. App., *infra*, 4a. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed. App., *infra*, 1a. Given the importance of

the jurisdictional issue and the conflict that exists among the circuits concerning it, Pittston files this petition for a writ of certiorari.

A. The Ownership and Control Rules

Since its adoption in 1977, SMCRA has contained a provision prohibiting the issuance of new mining permits to an applicant if "any surface coal mining operation owned or controlled by the applicant is currently in violation" of the Act. 30 U.S.C. § 1260(c); App., *infra*, 44a. In 1988, the federal Office of Surface Mining Reclamation and Enforcement ("OSM") promulgated regulations defining "owned or controlled" and requiring that the state or federal agency issuing the permit to review the violation history of the applicant and any person "owned or controlled" by the applicant. 53 Fed. Reg. 38,868 (October 3, 1988); 30 C.F.R. §§ 773.5, 773.15(b); App., *infra*, 47a, 49a. Under the agency's new rules, "control" is presumed in a variety of contractual relationships where none was previously thought to exist. App., *infra*, 93a. In particular, control is now presumed in any relationship in which one party owns the coal, contracts with another party to mine the coal, and retains the right to receive the coal after mining. App., *infra*, 47a. In the industry, the companies that mine coal under such arrangements are known as "contractors" or "contract miners."

In implementing its new regulations, OSM also established a computer system to link violators with their "owners" or "controllers." When the OSM computer shows a link with a violator, the applicant is blocked from obtaining new permits until all outstanding violations of

the violator are "abated." In order to abate a violation, the applicant must pay the violator's outstanding civil penalties plus interest, perform any uncompleted reclamation, and reimburse the government for the cost of any reclamation completed by it.[2] App., *infra*, 73a.

B. Application of the Rules to Pittston

On December 20, 1990, OSM informed Pittston that the agency had "reason to believe" that Pittston "controlled" four companies with outstanding violations of the surface mining laws. App., *infra*, 59a. The four companies were contractors for Pittston in the late 1970's and early 1980's before the ownership and control rules were promulgated. None had any current relationship with Pittston. When the companies mined coal on Pittston's property, they did so under their own mining permits and reclamation bonds. App., *infra*, 66a, 92a.

Collectively, the contractors were alleged to owe OSM approximately $400,000 in civil penalties for unspecified violations of the surface mining laws. App., *infra*, 75a. The contractors apparently took no steps to contest or abate the alleged violations, and the civil penalties accumulated unchecked until they reached the statutory maximum. App., *infra*, 67a. Pittston has never been assessed fines of this magnitude at any of its mines. App., *infra*, 68a.

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[2] Under the regulations, an applicant must also pay any abandoned mine land ("AML") fees due on coal mined by controlled party. App., *infra*, 49a. Previously, such fees could only be collected from an "operator." 30 U.S.C. § 1232.

Pittston did not have notice of the violations allegedly committed by the contractors or an opportunity to contest them at the time they were issued. App., *infra*, 63a, 68a. The violations were issued directly to the contractors, and Pittston was not a party to any process or proceeding that resulted in these fines. *Id.*

OSM informed Pittston that it would block the issuance of any new permits to Pittston unless the company (1) abated the outstanding violations, (2) entered into a settlement agreement, or (3) rebutted the agency's determination of control. App., *infra*, 60a. Pittston protested on the ground that it had no notice of or opportunity to be heard on the alleged violations. OSM rejected Pittston's objections and told the company that it could contest the violations as a part of an appeal from denial of its permits. App., *infra*, 68a, 86a. In the meantime, however, Pittston would remain permit blocked – a sanction that Pittston could not afford to endure. App., *infra*, 94a, 96a.

C. Proceedings Below

Following evidentiary hearings, the District Court concluded that due process entitled Pittston to notice and hearing before being permit blocked by OSM. App., *infra*, 29a, 32a. OSM presented no evidence to the District Court that it was impractical to provide such a hearing. App., *infra*, 36a. Pittston, on the other hand, showed that a permit block would have drastic consequences on the company and its employees. App., *infra*, 94a, 96a. The District Court therefore preliminarily enjoined OSM from blocking Pittston's permits without prior notice and hearing. App., *infra*, 29a, 32a.

Based on a series of Fourth Circuit decisions, however, the District Court ultimately dismissed Pittston's complaint for lack of subject matter jurisdiction. The District Court held that a challenge to administrative action taken pursuant to a regulation is a challenge to the regulation itself and, under 30 U.S.C. § 1276(a), can only be heard by the District Court for the District of Columbia. App., *infra*, 4a.

At Pittston's request, the District Court left its injunction in effect pending Pittston's appeal to the Fourth Circuit. Following briefing and oral argument, the Fourth Circuit stayed its decision pending resolution of facial challenges to the ownership and control rules, then before the District Court for the District of Columbia. See *National Wildlife Fed'n v. Babbitt*, No. 88-3117 (consolidated) (D.D.C.). After the District Court for the District of Columbia upheld the facial validity of the rules (slip opinion dated August 31, 1995), the Fourth Circuit affirmed the judgment against Pittston. The Fourth Circuit stayed its mandate, however, leaving the injunction in effect to allow Pittston to file this petition. App., *infra*, 40a.

REASONS FOR GRANTING THE PETITION

There is a square conflict among the circuits on whether district courts outside the District of Columbia have jurisdiction to decide challenges to federal mining regulations. This Court has previously granted certiorari to resolve this important issue, but the case settled before

it could be decided. In affirming the dismissal of Pittston's case, the Court of Appeals held that SMCRA prohibits challenges to action taken "in accordance with" a regulation, as well as challenges to the regulation itself. Since everything the agency does is arguably pursuant to one regulation or another, the Court of Appeals has erroneously immunized a wide range of administrative action from review anywhere except the District of Columbia.

I. There Is a Direct Conflict Among the Circuits on the Issue of Federal Jurisdiction

30 U.S.C. § 1276(a)(1) states that "[a]ny action by the Secretary promulgating national rules or regulations . . . shall be subject to judicial review in the United States District Court for the District of Columbia." Does this mean that judicial review of such action may be had *only* in the District of Columbia? The Court of Appeals for the Sixth Circuit has answered this question in the negative. *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 737-39 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982) (local district courts have concurrent jurisdiction to determine validity of regulations). Other circuits have, however, expressly rejected the decision in *Holmes Limestone* and held that 30 U.S.C. § 1276(a)(1) vests the District Court for the District of Columbia with exclusive jurisdiction to decide challenges to federal surface mining regulations. *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210, 1213-14 (Fed. Cir. 1990); *United States v. Troup*, 821 F.2d 194, 199 (3d Cir. 1987); *Virginia ex rel. Virginia Dep't of Conserv. & Econ. Dev. v. Watt*, 741 F.2d 37, 41 n.5 (4th Cir.

1984), *cert. granted*, 469 U.S. 979, *cert. dismissed* (case settled), 469 U.S. 1198 (1985); *Drummond Coal Co. v. Watt*, 735 F.2d 469, 473 (11th Cir. 1984).

Where the statute is thought to be exclusive, the courts are further divided on whether it precludes constitutional as well as other challenges to regulations. *Compare Pittston Co. v. Lujan*, 798 F. Supp. 344 (W.D. Va. 1992) (App., *infra*, 4a) (constitutional claim precluded) *with B&M Coal Corp. v. Office of Surface Mining*, 531 F. Supp. 677 (S.D. Ind. 1982), *aff'd*, 699 F.2d 381 (7th Cir. 1983) (constitutional claim not precluded). The Fourth Circuit has both heard constitutional issues involving regulations, *Tug Valley Recovery Center v. Watt*, 703 F.2d 796 (4th Cir. 1983), and refused to hear such issues, *Pittston Coal Co. v. Babbitt*, 66 F.3d 714 (4th Cir. 1995) (App., *infra*, 1a).

Despite the contrary decisions from other circuits, the Sixth Circuit continues to cite *Holmes Limestone* with approval. *Horizon Coal Corp. v. United States*, 43 F.3d 234, 240 n.5 (6th Cir. 1994). Thus, the conflict is unresolved and has no prospect of being resolved absent a decision from this Court.

II. The Question Presented Is Important

The jurisdictional issue presented in this case determines what courts can consider challenges to the promulgation or application of surface mining regulations. The issue is important to both mining companies and citizens affected by mining, as well as to government. As it stands now, regulations (1) may be challenged on any grounds in some regions, (2) may be challenged on some grounds in other regions, and (3) may not be challenged

on any grounds in yet other regions. There should be one rule for all regions.

This Court has previously granted certiorari to resolve the issue, but the case settled before it could be decided. *Virginia ex rel. Virginia Dep't of Conserv. & Econ. Dev. v. Watt*, 741 F.2d 37 (4th Cir. 1984), *cert. granted*, 469 U.S. 979, *cert. dismissed*, 469 U.S. 1198 (1985). The Court should take this opportunity to finally resolve the issue.

III. The Decision Below Is Erroneous

The Court of Appeals affirmed the dismissal of Pittston's complaint on the "compelling reasoning of the district court." App., *infra*, 3a. Although the District Court initially concluded that it had jurisdiction, and granted a preliminary injunction, App., *infra*, 29a, 32a, 38a, it later determined that decisions of the Court of Appeals required dismissal.[3] App., *infra*, 4a; see *Clinchfield Coal Co. v. DOI*, 802 F.2d 102 (4th Cir. 1986); *Virginia ex rel. Virginia Dep't of Conserv. & Econ. Dev. v. Watt*, 741 F.2d 37 (4th Cir. 1984); *Tug Valley Recovery Ctr. v. Watt*, 703 F.2d 796 (4th Cir. 1983). At present, no court in the Fourth Circuit will hear any challenge to any action by the Secretary of Interior – however unlawful – if the

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[3] The district judge hearing the case was reversed in one of the Fourth Circuit's prior decisions. *Jaward Corp. v. Watt*, 564 F. Supp. 797 (W.D. Va. 1983), *rev'd sub. nom., Virginia ex rel. Virginia Dep't of Conserv. & Econ. Dev. v. Watt*, 741 F.2d 37 (4th Cir. 1984). As the district judge remarked in his opinion, "Having been reversed once, this court declines [Pittston's] invitation for a second opportunity." App., *infra*, 25a.

Secretary's action can be characterized as being "in accordance with" his regulations. App., *infra*, 23a.

As we show, the decision in this case is erroneous for two reasons. First, 30 U.S.C. § 1276(a)(1) vests the D.C. District Court with concurrent – not exclusive – jurisdiction to review action by the Secretary promulgating national rules or regulations. Second, whether exclusive or not, the statute does not restrict judicial review of cases arising from the *application* of regulations; a regulation can be unlawfully applied without being unlawfully promulgated.

A. Section 1276(a)(1) Does Not Establish Exclusive Jurisdiction In This Case

Section 1276(a)(1) lists three different administrative actions and three different places where they are subject to judicial review. For two of the actions, the place is not stated to be exclusive. For one, it is.

Any action by the Secretary to approve or disapprove a state program or to promulgate a federal program "shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue." 30 U.S.C. § 1276(a)(1). Any action by the Secretary promulgating national rules "shall be subject to judicial review in the United States District Court for the District of Columbia." *Id.* But any other action constituting rulemaking by the Secretary "shall be subject to judicial review *only* by the United States District Court for the District in which the coal mining operation is located." *Id.* (emphasis added).

Is the omission of "only" significant when describing the places that actions may be reviewed? Different courts examining this issue have reached different conclusions. *Compare Holmes Limestone Co. v. Andrus*, 655 F.2d at 737, *with Drummond Coal Co. v. Watt*, 735 F.2d at 474.

Much of the debate has focused on legislative history. In the House bill, the Secretary's action in approving or disapproving a state program was "subject to judicial review *only* by the United States Court of Appeals for the circuit which contains the State whose program is at issue. . . . " See H.R. Rep. No. 218, 95th Cong., 1st Sess., at 46 (1977) (emphasis added). The Secretary's action in promulgating national standards was "subject to judicial review *only* in the United States Court of Appeals for the District of Columbia." *Id.* (emphasis added). And all other orders or decisions of the Secretary were "subject to judicial review *only* in the United States district court for the locality in which the surface coal mining operation is located." *Id.* (emphasis added). The Senate version also used the word "only" when describing the places for judicial review, but specified that all review should be in courts of appeal. See S. Rep. No. 128, 95th Cong., 1st Sess., at 41 (1977).

In conference, the statute took its present form. "Only" was deleted from the provision allowing review of action approving or disapproving a state program and from the provision allowing review of action promulgating national rules, and the two actions were made reviewable by district courts. H.R. Rep. No. 493, 95th Cong., 1st Sess., at 75 (1977). A provision was added making "[a]ny other action constituting rulemaking . . .

subject to judicial review *only* by the United States District Court for the District in which the surface coal mining operation is located." *Id.* The statute was also amended to provide for local judicial review of orders or decisions in civil penalty proceedings or other proceedings required to be conducted pursuant to 5 U.S.C. § 554. *Id.*

Those who contend that every venue mentioned in the statute is exclusive speculate that the omission of "only" was the result of careless legislative drafting. See *Drummond Coal Co. v. Andrus*, 735 F.2d at 474. Pittston submits, however, that speculation about how words came to be included or omitted from the statute is not a reliable guide for decision in this case.

As enacted, the statute says that any action promulgating national rules is subject to review in the District of Columbia. It does not say that the District of Columbia is the exclusive place for such review. Unless Congress clearly provides otherwise, administrative actions are reviewable in any appropriate forum. *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967) (under Administrative Procedure Act judicial review should be restricted only upon clear and convincing evidence of legislative intent to do so); *see* 5 U.S.C. §§ 701-704. Given this policy, there is no need to speculate on whether Congress carelessly omitted the word "only" from the pertinent provisions of 30 U.S.C. § 1276(a)(1). Review should not be limited unless Congress clearly provided for it to be limited.

Those courts holding that the statute creates exclusive jurisdiction also cite SMCRA's purpose of "establish[ing] a *nationwide* program to protect society and the

environment from the adverse effects of surface coal mining operations. . . . " 30 U.S.C. § 1202(a) (emphasis added); *see Virginia ex rel. Virginia Dep't of Conserv. & Econ. Dev. v. Watt*, 741 F.2d at 40-41. These courts have concluded that creation of a single forum for review of regulations is "entirely consistent" with this purpose. *Drummond Coal Co. v. Watt*, 735 F.2d at 475. Again, however, whether exclusive jurisdiction would be "consistent with" one of SMCRA's many, sometimes conflicting,[4] purposes is not the question. The question is whether that is what Congress actually did. Under the language of the statute and policy of the APA, Congress allowed review of regulations in the District of Columbia, but it did not limit review to that forum.

B. Unlawful Application Versus Unlawful Promulgation

The decision of the Court of Appeals is not justified, however, even assuming that Congress meant for the District Court for the District of Columbia to have exclusive jurisdiction to review the promulgation of national rules. It is one thing to conclude that the provision was meant to be exclusive; it is quite another to conclude that this case falls within its parameters.

If Congress meant for the District of Columbia Court to have exclusive jurisdiction, it was to review "any

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[4] In enacting SMCRA, however, Congress also found that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations . . . should rest with the states. . . . " 30 U.S.C. § 1201(f); *see Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 271-72 (1981).

action by the Secretary promulgating national rules or regulations." Pittston's case involves the application of the Secretary's regulations, not their promulgation. Pittston alleged and proved that – as applied in this case – the regulations violate due process.[5] Pittston showed that the application of the rules was unlawful, not in every case, but in this case. Pittston did not ask the District Court to invalidate the rules, but only to insure that they were applied consistent with due process.

A challenge to the application of a regulation is not the same as a challenge to its promulgation. A law may be perfectly valid on its face but unlawfully applied. *See*

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[5] The due process deficiencies are clear: Pittston was not a party to the underlying contractor violations. It had no notice of those violations and no opportunity to contest the violations or the civil penalties that were assessed against the contractors. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice and hearing are "elementary and fundamental requirement[s] of due process in any proceeding which is to be accorded finality"); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (due process protects a person against a judgment in a prior proceeding to which he was not a party). OSM's offer to provide a notice and a hearing some time down the road after a permit block is imposed was neither meaningful nor adequate. *See United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (due process requires prior notice and hearing before government can deprive owner of real property absent exigent circumstances); *Connecticut v. Doehr*, 501 U.S. 1 (1991) (violation of due process to allow prejudgment attachment absent exigent circumstances); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (notice and hearing must be provided at "a meaningful time and in a meaningful manner"). In this case, OSM offered *no reason* why it was not practical to give Pittston a hearing before a permit block was imposed. App., *infra*, 36a.

Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264, 294 (1981).

The Fourth Circuit went too far when it held that a challenge to the application of a regulation is equivalent to a challenge to the promulgation of that regulation. There is no support for such an extreme interpretation, either in the language of the statute or its legislative history. Interested parties should not be expected to anticipate and challenge every possible unlawful application of a regulation at the time it is promulgated. Even if they could, there is no indication that Congress meant to require that they do so.

Unless this case falls within a preclusion-of-review statute, the District Court had jurisdiction to decide it. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). This case presents substantial constitutional issues, which should be freely reviewable where they arise. *See id.* The Fourth Circuit erred in limiting review to the District Court for the District of Columbia.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PITTSTON COAL COMPANY; Clinchfield Coal Company,

Plaintiffs-Appellants,

v.

Bruce BABBITT,[1] Secretary, Department of The Interior; Commonwealth of Virginia, Department of Mines, Minerals & Energy, Division of Mine Land Reclamation, Defendants-Appellees.

No. 92-1606.

United States Court of Appeals,
Fourth Circuit.

Argued Sept. 29, 1992.

Decided Oct. 6, 1995.

Coal mining company brought action challenging, on due process grounds, denial of surface mining permits by Department of the Interior and Commonwealth of Virginia. The United States District Court for the Western District of Virginia, Glen M. Williams, Senior District Judge, dismissed for lack of subject matter jurisdiction, 798 F.Supp. 344, and coal mining company appealed. The Court of Appeals, Hamilton, Circuit Judge, held that United States District Court for the District of Columbia had exclusive jurisdiction over the claim.

Affirmed.

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[1] Substituted for former Secretary of the Interior Manuel Lujan pursuant to Fed.R.App.P. 43(c).

ARGUED: Wade Wallihan Massie, Penn, Stuart, Eskridge & Jones, Abingdon, Virginia, for Appellants. Katherine Leatherman Adams, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., for Appellees. **ON BRIEF:** Stephen M. Hodges, Penn, Stuart, Eskridge & Jones, Abingdon, Virginia; John R. Woodrum, Smith, Heenan & Althen, Washington, D.C., for Appellants. Vicki A. O'Meara, Acting Assistant Attorney General, Dirk D. Snel, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Charles Gault, United States Department of the Interior, Knoxville, Tennessee; Richard H. McNeer, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; Zane B. Scott, Office of the Attorney General of Virginia, Big Stone Gap, Virginia, for Appellees.

Before RUSSELL, WILKINS, and HAMILTON, Circuit Judges.

Affirmed by published opinion. Judge HAMILTON wrote the opinion, in which Judge RUSSELL and Judge WILKINS joined.

OPINION

HAMILTON, Circuit Judge:

Appellants Pittston Company (Pittston) and Clinchfield Coal Company (Clinchfield) brought this action asserting that the proposed denial of their applications for mining permits violated their procedural due process rights. Appellees Bruce Babbitt, Secretary of the Interior, and the Commonwealth of Virginia moved to

dismiss the case for lack of subject matter jurisdiction. *See* Fed.R.Civ.P. 12(b)(1). The district court granted the motion, holding that, pursuant to 30 U.S.C Sec. 1276(a)(1), the case could only be brought in the United States District Court for the District of Columbia. *Pittston Co. v. Lujan,* 798 F.Supp. 344, 353 (W.D.Va.1992). Pittston and Clinchfield appeal.

We have carefully examined the record, briefs, arguments of the parties, and the opinion of the district court. We agree with the district court that it did not have subject matter jurisdiction under 30 U.S.C. Sec. 1276(a)(1). Therefore, we affirm on the compelling reasoning of the district court.[2]

AFFIRMED

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[2] In view of this disposition, we deny the appellants' motion to continue to hold this case in abeyance, or alternatively, to allow supplemental briefing.

The PITTSTON COMPANY and Clinchfield Coal Company, Plaintiffs,

v.

Manuel LUJAN, Jr., Secretary of the Interior and Commonwealth of Virginia, Defendants.

Civ. A. No. 91-0006-A.

United States District Court,
W.D. Virginia,
Abingdon Division.

April 23, 1992.

Coal mining company brought action challenging the Office of Surface Mining Reclamation and Enforcement's denial of surface mining permits without hearing on issue of underlying violations. On defense motion to dismiss, the District Court, Glen M. Williams, Senior District Judge, held that coal mining company's challenge to recommendation that surface mining permits be denied company without prior hearing on issue of validity of underlying violation was tantamount to attack on regulations themselves, and thus, challenge could be brought only in the District of Columbia.

Motion granted.

FACTUAL AND PROCEDURAL BACKGROUND

The Pittston Company ("Pittston"), through its subsidiaries, is engaged in the business of mining coal in Virginia and other states. Clinchfield Coal Company ("Clinchfield") is an indirect wholly-owned subsidiary of

Pittston operating in Virginia. Manuel Lujan, Jr. is Secretary of the United States Department of Interior ("Secretary"), which, through the Office of Surface Mining Reclamation and Enforcement ("OSM"), administers the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201-1328, and promulgates regulations governing surface coal mining. The Commonwealth of Virginia, through its Department of Mines, Minerals and Energy ("DMME") and Division of Mine[d] Land Reclamation ("DMLR"), obtained federal approval in 1981 as the primary regulatory authority and issuer of permits for surface coal mining in this state, with the Secretary, through OSM, retaining certain oversight authority.

Clinchfield is engaged in the business of mining, processing, and selling coal in Virginia. Clinchfield also hires independent contractors, known in the business as "contract miners," who mine for the company. The parties stipulated that, at certain times from the late 1970s to the mid-1980s, Golden Chip Coal, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy Company ("the Contractors") were contract miners for Clinchfield at locations in Southwest Virginia. During this time, Clinchfield owned or leased the coal being mined by the Contractors and, pursuant to contracts with them, had the right to receive the coal after mining. The Contractors were independently owned and operated and held their own permits from OSM and DMLR to conduct surface coal mining.

On October 3, 1988, the Secretary adopted regulations, effective November 2, 1988, defining the term "owned or controlled" as used in the SMCRA, 30 U.S.C.

§ 1260(c),[1] and revising the scope of review of a permit applicant's environmental compliance record prior to issuance of new permits. 30 C.F.R. § 773.5, 773.15(b).[2] At the same time, OSM established the Applicant/Violator System ("AVS"), a computer system that identifies whether an applicant for a permit is linked by ownership or control to any person having outstanding violations of federal or state surface mining laws.

Annetta L. Cheek, Chief of OSM's Applicant/Violator System Office ("AVSO"), submitted an affidavit describing the procedure followed for evaluating permit applications under § 510(c) of SMCRA, 30 U.S.C. § 1260(c). Cheek stated that the primary resource available to regulatory authorities for evaluating permit applications is the AVS. When queried, the AVS makes a recommendation to issue, deny, or condition a permit based on whether the AVS discovers an ownership or control link between the applicant and an outstanding violation. Cheek stated that the states are not required to follow the AVS or AVSO recommendation; but under their respective memoranda of understanding with OSM,

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[1] This section provides in part, "Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected. . . . " 30 U.S.C. § 1260(c).

[2] These regulations are presently the subject of judicial review in a pending suit in the District of Columbia. *National Wildlife Federation v. Lujan*, No. 88-3117 (D.D.C.) (consolidated).

the states are required to consider any information they receive from the AVS or AVSO before issuing a permit. However, Bill Bledsoe from the DMME stated that his agency had never overridden an OSM block based on federal violations. (2/6/91 Tr. at 71). Following the February 6, 1991 hearing, the OSM and DMLR entered into an agreement which requires Virginia to participate in the AVS and to refuse permits to any person the AVS links to a violator unless (1) the ownership or control link has been shown to be erroneous or (2) the applicant proves that the violation has been, or is being, abated or is the subject of a good faith appeal. (Plaintiffs' Exhibit 4 at 5, filed 11/12/91).

Cheek stated that the ownership or control link is determined by using the standards set forth in 30 C.F.R. §§ 773.5, 773.15(b)(1). The ownership and control information in the AVS comes from two sources: (1) information submitted in applications for surface mining permits pursuant to § 507 of SMCRA, 30 U.S.C. § 1257, and equivalent state requirements, and (2) information developed through research conducted by the AVSO's Lexington, Kentucky office. At present, violations in the AVS consist of state's reports of bond forfeitures, OSM's reports of unabated federal performance standard violations, unpaid federal civil penalties, and unpaid abandoned mine land fees.

Cheek's affidavit also addressed an applicant's access to information in the AVS and the applicant's opportunities to amend adverse information prior to the information being used to block permits. Cheek stated that, when the AVSO identifies a link to an unabated violation, the AVSO sends a letter, hereinafter referred to as the

thirty-day letter, to the newly identified entity notifying the entity that the link has been discovered. The entity then has thirty days to submit material that may correct the violation information or rebut an ownership or control link to the outstanding violation. The entity may wish to contest the status of the violation or the ownership or control link. The "status" of the violation includes whether such violation has been corrected, is being corrected, or is the subject of a good faith appeal. The "ownership or control" link is reviewed under 30 C.F.R. §§ 773.5, 773.15(b)(1). However, the AVSO does not review the "validity" of federal or state violations. The validity of the violation refers to whether a violation existed at all or was the responsibility of the party cited.

If there is no response to the thirty-day letter, the AVSO will recommend denial of any pending or future permit. If the material submitted in response to the thirty-day letter is unpersuasive, the AVSO will respond by letter, hereinafter referred to as the ten-day letter, explaining why the AVSO continues to believe the link exists. OSM will provide the company with its documentation and suggest the type of documentation the company could submit to show that there is no link. The entity then has ten days to respond. If there is no response to the ten-day letter, the information is entered into the AVS. If a person responds to the ten-day letter, but does not rebut the link, the Director of the OSM ("Director") issues OSM's final decision notifying the entity that a link has been created. If the letters are persuasive, the information will not be used.

Corporations may appeal an adverse decision by the Director to the OSM's Office of Hearings and Appeals,

Interior Board of Land Appeals as provided by 43 C.F.R. §§ 4.1280 to 4.1286. An adverse ruling by this body may be appealed to the appropriate federal district court pursuant to 5 U.S.C. §§ 702, 704.

Separately from the thirty-day letter process, the AVSO sends applicants, for whom it recommends granting a permit, a list of known ownership and control relationships involving the applicant. The applicant may then advise the AVSO of any erroneous information in the "organizational family tree," thus preventing any possible erroneous thirty-day letters.

Independent of the thirty-day letter process, individuals may obtain information relating to them in the AVS by submitting a request under the Privacy Act, 43 C.F.R. § 2.63. The applicant can also submit a request under the Freedom of Information Act, 43 C.F.R. § 2.14.

An individual or entity may at any time seek to amend information contained in the AVS prior to filing an application. If the individual or entity submits information that rebuts a presumed ownership or control link, the link is removed from the AVS. However, if the OSM remains convinced that the link exists, the Director issues a written decision and the link will remain. Administrative and judicial review can be had as previously described.

Even if an individual or entity has not taken advantage of the opportunities to contest the accuracy of the information prior to filing an application, an applicant has opportunities for administrative review during the

application review process. If the regulatory authority[3] accepts an AVSO recommendation to deny an application, the regulatory authority notifies the applicant and refers the applicant to the state or federal agency with jurisdiction over the violation linked to the applicant. The applicant may submit to the regulatory authority a response to an adverse recommendation of the AVSO. Such a response may attempt to refute the facts or rebut the presumptions underlying the ownership or control link. The regulatory authority must issue a decision on the permit application within a reasonable time pursuant to 30 U.S.C. § 1264(b) or equivalent state law.

After a permit is denied, an applicant may challenge any basis for a denial, including the status or validity of an outstanding violation or the ownership or control link to an unabated violation. SMCRA and its implementing regulations establish procedures for review of decisions on permit applications. 30 U.S.C. § 1264. When OSM is the regulatory authority, a decision denying an application for a surface coal mining permit may be appealed to the Department's Office of Hearings and Appeals, Hearing Division pursuant to 43 C.F.R. §§ 4.1360-4.1388. An adverse decision of the Hearings Division may be appealed to the Interior Board of Land Appeals pursuant to 43 C.F.R. §§ 4.1369, 4.1378, and 4.1388. A decision by the Interior Board of Land Appeals is subject to judicial review pursuant to 30 U.S.C. § 1276. Alternatively, if the

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[3] The applicable state regulatory authority makes the permitting decisions in the twenty-three states that, like Virginia, have approved regulatory programs. OSM is the regulatory authority in the other coal producing states.

Hearings Division upholds OSM's decision to deny a new surface mining permit, the applicant may bypass the Interior Board of Land Appeals and seek judicial review of the Hearing Division's decision pursuant to 30 U.S.C. § 1276(a)(2) and 43 C.F.R. § 4.1369(a). State regulatory programs also contain administrative and judicial review procedures.

Turning to the present case, the evidence shows that on December 14, 1990, OSM sent a thirty-day letter to Coal Energy, Inc., Fadco Inc. and to the individuals and entities, including Clinchfield, found to be owners or controllers. (Exhibit C & D, Defendants' Memorandum in Support of Summary Judgment [hereinafter S.J. Memorandum]). By letter dated December 20, 1990, OSM advised Pittston that it had reason to believe that Pittston, through Clinchfield, controlled the Contractors as that term is defined in 30 C.F.R. § 773.5(b)(6).[4] OSM stated that the Contractors had outstanding violations of SMCRA[5] and that the Contractors were blocked from

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[4] The regulations provide that the following relationship is presumed to constitute ownership or control:

> Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having the authority to determine the manner in which that person or another person conducts a surface coal mining operation.

30 C.F.R. § 773.5(b)(6).

[5] The parties stipulated that, "Plaintiffs were not named in the underlying notices or orders nor did they receive notice from the defendants concerning the underlying proceedings against the Contractors giving rise to the fines and penalties in question, and plaintiffs were not parties to and did not participate in those proceedings."

obtaining permits pursuant to 30 C.F.R. 773.15(b).[6] OSM advised that once the information in the AVS was updated to reflect this control, Pittston would also be blocked from obtaining permits unless (1) each violation to which Pittston was linked had been abated to the satisfaction of the agency having jurisdiction over such violation, (2) an agreement to resolve such violation had been entered into and was being implemented, or (3) OSM's determination of ownership and control had been successfully rebutted.

OSM advised Pittston that if it wished to rebut OSM's ownership and control finding, before a final determination was made, or if Pittston wished to enter into an abatement agreement with respect to the Contractors, Pittston should contact the OSM. Otherwise, if Pittston did not respond by January 18, 1991, the AVS system would be updated using the information obtained in OSM's investigation. By agreement of the parties, the deadline was extended to January 25, 1991. As of the filing of the lawsuit, OSM had not made a final determination of a control linkage between Plaintiffs and the Contractors. Accordingly, OSM had not entered the link into the AVS. (2/6/91 Tr. at 41).

On January 18, 1991, Plaintiffs filed their complaint in this action. Plaintiffs alleged that, if the OSM blocked

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[6] This regulation states that "the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph." 30 C.F.R. § 773.15(b)(1).

their permit applications for the reasons stated in the December 20, 1990 letter, their procedural due process rights would be violated because "plaintiffs were not parties to the prior actions against the contractors and did not have proper notice of or an opportunity to contest either the underlying violations or the penalties assessed therefor." (Complaint at ¶ 12). Plaintiffs sought a TRO, a preliminary injunction, and a permanent injunction enjoining Defendants from: (1) blocking Plaintiffs or their associates or affiliates from obtaining surface mining permits based on violations or other liabilities of the Contractors or any other contractor of Plaintiffs; (2) refusing to renew or rescinding existing permits of Plaintiffs or their associates or affiliates on account of violations or other liabilities of any such contractors; and (3) from otherwise linking Plaintiffs or their associates or affiliates with any violations or other liabilities of any such contractor.

On January 23, 1991, this court issued a TRO as requested by Plaintiffs. On February 5, 1991, Defendants moved the court to dismiss the case pursuant to Fed.R.Civ.P. 12(b) and (c) for lack of subject matter jurisdiction. On February 6, 1991, the court held a hearing on Plaintiffs' motion for preliminary injunction. On February 8, 1991, this court issued a preliminary injunction as requested by Plaintiffs. The court based jurisdiction on 28 U.S.C. § 1331. The court stated that, because Plaintiffs had not challenged any national rules or regulations, the court was not ruling upon any such rule or regulation, and the merits of any such rule or regulation were not before the court, the action need not be brought in the District of Columbia pursuant to 30 U.S.C. § 1276(a)(1) as

Defendants alleged. This preliminary injunction was limited to permit blocking due to violations of only the Contractors rather than the broader injunction sought by Plaintiffs.

On April 5, 1991, Defendants filed a notice of appeal of the February 8, 1991 order. On August 13, 1991, the Fourth Circuit granted Defendants' motion for a voluntary dismissal of the appeal without prejudice.

On November 7, 1991, Plaintiffs submitted a proposed final order which would permanently enjoin the Secretary from recommending denial of permits based on outstanding violations by the Contractors "or any other contractor of plaintiffs or their affiliates . . . until such time as defendants have given plaintiffs a due process hearing with notice of the offense and a final, independent determination as to the existence and validity of the underlying violations. . . . " (Plaintiff's Proposed Final Order at 9-10). On November 27, 1991, Defendants moved for summary judgment alleging: (1) this court is without jurisdiction in this case because it presents an indirect challenge to the Secretary's national rules or regulations which can be brought only in the United States District Court for the District of Columbia pursuant to 30 U.S.C. § 1276(a)(1); (2) the administrative appeal procedures available to Plaintiffs afford the requisite procedural due process; and (3) Plaintiffs have failed to exhaust all administrative remedies prior to initiating this judicial action.

On January 17, 1992, while the court was awaiting final briefing by the parties, Plaintiffs filed a motion to expand the preliminary injunction based upon additional

actions taken by Defendants and their agents. The court held an evidentiary hearing on January 22, 1992. At that time, the court did not expand the preliminary injunction. On February 4, 1992, Plaintiffs filed a renewal of their motion to expand the preliminary injunction. The court held an evidentiary hearing on February 10, 1992.

In their motions to expand the preliminary injunction, Plaintiffs alleged that OSM, by letter dated January 24, 1992, claimed that Pittston or its subsidiaries owed certain delinquent abandoned mine land ("AML") fees for Ranger Fuel Corporation and North Star Coal Company ("North Star"). The letter warned that failure to pay these fees could result in a total ban on further mining permits in any state. The evidence showed that Ranger Fuel, a subsidiary of Pittston, was the permitee and had allowed North Star to mine on its permits in West Virginia. Plaintiffs asked that the injunction be expanded to embrace other operations of the OSM in West Virginia and Kentucky as well as in Virginia until OSM has given them a hearing to determine their responsibility for the AML fees. In a Memorandum Opinion and Order entered February 24, 1992, this court expanded the preliminary injunction as Plaintiffs requested.

ANALYSIS

I. *Jurisdiction*

The initial issue is whether this court has jurisdiction over this action. Defendants assert that Plaintiffs' action is necessarily a challenge to OSM's ownership and control regulations at 30 C.F.R. §§ 773.5(b)(6) and 773.15(b)(1). (S.J. Memorandum at 11). As such, it can be

brought only in the United States District Court for the District of Columbia Circuit. 30 U.S.C. § 1276(a)(1). According to Defendants, Plaintiffs do not contest ownership or control of the Contractors as defined in 30 C.F.R. § 773.5(b)(6). Therefore, under 30 C.F.R. § 773.15(b)(1), if the Contractors have outstanding violations "the regulatory authority *shall not* issue the permit." (emphasis added). Yet, despite the mandate of the regulations, the Plaintiffs ask that OSM be enjoined from blocking the permits on due process grounds. Defendants allege that this attack on OSM's administrative action, taken in accordance with the Secretary's regulations, constitutes an indirect challenge to the regulations themselves which the Fourth Circuit has held cannot be brought in this district. *See Commonwealth of Virginia v. Watt*, 741 F.2d 37, 40 (4th Cir.1984).

On the other hand, Plaintiffs assert that this case presents a federal question under 28 U.S.C. § 1331. "The federal question presented is whether it is a violation of due process for the government to block the issuance of mining permits to the plaintiffs on the basis of fines and penalties incurred by contractors in prior proceedings where plaintiffs were not parties . . . and did not have proper notice or opportunity to be heard." (Plaintiffs' Memorandum in Support of Permanent Injunction at 13 [hereinafter P.I. Memorandum]). Plaintiffs assert that this court's exercise of jurisdiction would not contravene 30 U.S.C. § 1276(a)(1). Plaintiffs allege that they do not question the authority of the Secretary to promulgate a rule which defines "ownership or control," nor do they attack the merits of the rule which has been promulgated. Rather, Plaintiffs assert that the question whether the

Secretary's application of the regulation violates the Plaintiffs' procedural due process is subject to judicial review in this district under 30 U.S.C. § 1276(a)(1). *See B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement*, 531 F.Supp. 677, 680 (S.D.Ind.1982), *aff'd*, 699 F.2d 381 (7th Cir.1983).

30 U.S.C. § 1276(a)(1) provides:

> Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. *Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit.* Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the district in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary capricious or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings

> and who is aggrieved by the action of the Secretary.

30 U.S.C. § 1276(a)(1) (emphasis added).

Three Fourth Circuit opinions have addressed jurisdiction under 30 U.S.C. § 1276(a)(1). *Clinchfield Coal Co. v. DOI*, 802 F.2d 102 (4th Cir.1986); *Commonwealth of Virginia v. Watt*, 741 F.2d 37 (4th Cir.1984); and *Tug Valley Recovery Center v. Watt*, 703 F.2d 796 (4th Cir.1983). In *Tug Valley*, an environmental group brought an action against the Secretary alleging: (1) the Secretary acted in violation of § 503 of SMCRA and 30 C.F.R. § 705.5 by approving a state environmental regulatory program that included, contrary to the SMRCA's conflict of interest provision found at § 517(g), 30 U.S.C. § 1267(g), an appeal review board composed of individuals with interests in coal mining; (2) the Secretary's approval of this portion of the state program violated the due process clause of the Fifth Amendment by establishing a system with inherent conflicts of interests; and (3) that certain state defendants, by implementing the regulatory program, denied plaintiffs their Fourteenth Amendment procedural due process rights by relegating them to an appeal before a biased review board. *Id.* at 799.

The district court dismissed the case for lack of subject matter jurisdiction under 30 U.S.C. § 1276(a)(1). The court characterized the plaintiff's claim as an attack on 30 C.F.R. § 705.5 inasmuch as the regulation exempted advisory board members representing multiple interests from the conflict of interest provisions in 30 U.S.C. § 1267(g). The court then dismissed the entire case without addressing the constitutional claims. *Id.* at 799.

On appeal, the Fourth Circuit found that the district court lacked jurisdiction over the plaintiff's first claim, which amounted to an attack on the regulations. The court stated:

> Tug Valley simply has no statutory ground for complaint under the existing regulatory scheme. Its challenge to the Secretary's approval of the [review board] – approval which was entirely consistent with section 517(g) of the Act as elaborated under 30 C.F.R. § 705.5 – can only be construed as an attack on § 705.5 itself. Therefore, the district court's dismissal of Tug Valley's statutory claim for lack of subject matter jurisdiction was proper.

Id. at 800. However, the court then proceeded to examine the plaintiff's remaining constitutional claims. The court ultimately dismissed the claims, not for lack of jurisdiction, but because the constitutional claims failed to state a constitutional violation. *Id.* at 801.

In *Commonwealth of Virginia v. Watt,* the Secretary adopted Virginia's state regulatory plan, subject to its compliance with a federal exemption for mining operations which affect less than two acres. *Commonwealth of Virginia,* 741 F.2d at 38. Subsequently, Virginia adopted Chapter 23, Va.Code Ann. § 45.1-362 to -380 (1982) entitled "Surface Mining of Coal for Operations Disturbing Two Surface Acres or Less." The Secretary alleged that Chapter 23 failed to include certain provisions of the federal regulations found at 30 C.F.R. §§ 700.11 and 701.5 and allowed coal operators to avoid federal regulation of their mines. *Id.* at 38-39. Therefore, the Secretary began enforcement actions, including the issuance of cessation

orders, to require compliance with the federal law and regulations governing the two-acre exemption. Plaintiffs sought an injunction claiming that "the Secretary was precluded from applying the two-acre criteria contained in the federal regulations and in Virginia's approved state program, because plaintiff's coal mines were in compliance with Chapter 23." *Id.* at 39.

The district court issued a temporary injunction prohibiting the OSM from issuing cessation orders at certain surface mining and reclamation operations in Virginia. *Id.* at 38. In deciding whether jurisdiction was proper, the district court framed the plaintiffs' argument as follows:

> The plaintiffs allege that the manner in which this cessation order was presented was a denial of due process in that the defendant denied plaintiff an opportunity for an administrative hearing to contest the cessation order and that the defendant does not intend to provide the plaintiff with other relief provided by the Act. . . . Accordingly, the plaintiff seeks a review of 30 C.F.R. § 700.11 alleging that the application of this regulation in effect denies his right of due process.

Jaward Corp. v. Watt, 564 F.Supp. 797, 799 (W.D.Va.1983), *rev'd sub nom. Commonwealth of Virginia v. Watt*, 741 F.2d 37 (4th Cir.1984).

The district court found that plaintiff "does not challenge the Department's rulemaking; rather, it questions whether its procedural due process guarantees have been violated by the Secretary's application of the Act or the implementing regulations." *Id.* (quoting *B & M Coal v. OSM*, 531 F.Supp. 677, 680 (S.D.Ind.1982), *aff'd*, 699 F.2d

381 (7th Cir.1983)). Therefore, the district court found that it had jurisdiction under 30 U.S.C. § 1276(a)(1) to "hear procedural due process violations as a result of the Secretary's application of the Act." *Id.*

However, the Fourth Circuit reversed. The court stated that "a district court in this Circuit lacks subject-matter jurisdiction over any action which is tantamount to an attack on a federal regulation" and "even an indirect attack on a federal regulation, could be brought only in the district court for the District of Columbia." *Commonwealth of Virginia*, 741 F.2d at 40 (citing *Tug Valley Recovery Center v. Watt*, 703 F.2d 796 (4th Cir.1983)). The Fourth Circuit stated:

> We find that our decision in *Tug Valley* governs the instant litigation and are unpersuaded by appellees' arguments and the district court's conclusions to the contrary. Focusing on the fact that the complaints challenged the secretary's cessation orders on due process grounds, the district court reasoned that it had jurisdiction to review plaintiffs' procedural due process claims under that portion of 30 U.S.C. § 1276(a)(1) which provides that "[a]ny other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the district in which the surface coal mining operation is located." *Jaward Corporation v. Watt*, 564 F.Supp. at 799. In spite of this conclusion, however, the district court examined the merits of the federal two-acre regulations in addressing the likelihood-of-success criteria for preliminary relief under 30 U.S.C. § 1276(c). Furthermore, the remedy fashioned by

> the district court is not directed at the Secretary's enforcement procedures, but instead prohibits any implementation of the federal two-acre regulations. Thus, the analysis employed by the district court inevitably leads back to our decision in *Tug Valley* that attacks on administrative action, taken in accordance with the Secretary's regulations, amounts to attacks on the regulations themselves, and may not be heard in this Circuit.

Id. The court also stated, "Nor do we accept the rationale that federal question jurisdiction can be invoked to avoid the forum for judicial review made available by Congress to challenge national mining regulations." *Id.*

In *Clinchfield Coal Co. v. DOI,* the district court enjoined the Secretary from enforcing a notice of violation pursuant to SMCRA. *Clinchfield Coal Co.,* 802 F.2d at 103. In granting the injunction, the district court found that the Secretary's national regulation exceeded the Secretary's statutory authority. *Id.* In deciding whether the district court had jurisdiction the Fourth Circuit stated:

> In *Commonwealth of Virginia v. Watt,* 741 F.Supp. 37 (4th Cir.1984), we found that an attack on administrative action taken in accordance with the Secretary of Interior's regulations under SMCRA was an attack on the regulations themselves and may be heard only in the U.S. District Court for the District of Columbia. In *Tug Valley Recovery Center v. Watt,* 703 F.2d 796 (4th Cir.1983), we concluded that a district court in the Fourth Circuit lacked subject-matter jurisdiction over any action that was tantamount to an attack on a federal regulation issued under SMCRA.

> [T]he district court found that the regulation . . . was void because it went beyond the scope of authority granted to [OMS]. Since this represents an attack upon the regulation, the U.S. District Court for the Western District of Virginia did not have jurisdiction to consider this point or to make this finding. Such district court does have jurisdiction to consider the temporary relief sought by Clinchfield Coal Company in this matter, so long as it does not take into consideration the merits of the federal regulations in addressing the likelihood-of-success for preliminary relief under 30 U.S.C. § 1276(c).

Id. at 103-04.

In the present case, the court finds the decision in *Commonwealth of Virginia* to be controlling and grants Defendants' motion to dismiss. This court has held that it does not have jurisdiction to hear a claim that a federal regulation is invalid. *Patrick Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 661 F.Supp. 380, 383 (W.D.Va.1987). The Fourth Circuit has stated that a district court in this circuit lacks jurisdiction over a claim "which constituted even an indirect attack on a federal regulation." *Commonwealth of Virginia*, 741 F.2d at 40. Specifically, the Fourth Circuit has stated "attacks on administrative action taken in accordance with the Secretary's regulations amount to attacks on the regulations themselves, and may not be heard in this circuit." *Id.*

Plaintiffs are not challenging OSM's interpretation of the regulations. Indeed, the parties have stipulated that Plaintiffs owned or controlled the Contractors as that term is defined in the regulations at 30 C.F.R. § 773.5(b)(6). Rather, Plaintiffs assert that the regulations

are silent on whether Plaintiffs are entitled to a pre-denial hearing on the underlying violations. (Plaintiffs' Proposed Final Order at 7). Thus, they assert, this action is not a challenge to the regulations. However, this argument is erroneous for two reasons. First, 30 C.F.R. § 773.15(b) governs the review of violations of permit applicants or of operations owned or controlled by the applicant. This regulation provides that, if the Contractors have outstanding violations, the regulatory authority *"shall not"* issue a permit. 30 C.F.R. § 773.15(b)(1) (emphasis added). This language is mandatory rather than permissive. Second, this regulation does provide for a pre-denial hearing, but only when the regulatory authority makes a determination that the permit applicant owns or controls an operation with a demonstrated pattern of willful violations. 30 C.F.R. § 773.15(b)(3).

Accordingly, the administrative action of recommending denial of the permits without a pre-denial hearing on the issue of the validity of the underlying violations is taken in accordance with the plain language of the regulations. Under Fourth Circuit precedence [sic], any attack on this action is tantamount to an attack on the regulations themselves which can be brought only in the District of Columbia. This result cannot be avoided by framing the question in terms of due process and asserting jurisdiction under 28 U.S.C. § 1331. *Commonwealth of Virginia*, 741 F.2d at 40.

Plaintiffs correctly note that the court in *Tug Valley* considered the plaintiff's constitutional claims. However, although the court in *Tug Valley* considered the constitutional issues raised by plaintiff, the Fourth Circuit, in the two subsequent decisions, cited the case for only the

principle that a district court lacks jurisdiction over a claim that is tantamount to an attack on the regulations. *Commonwealth of Virginia*, 741 F.2d at 40; *Clinchfield*, 802 F.2d at 103. If *Tug Valley* stood for the principle that this court has jurisdiction over constitutional challenges to the application of regulations, the Fourth Circuit would not have reversed this court's decision in *Jaward Corporation v. Watt*, 564 F.Supp. 797 (W.D.Va.1983). Having been reversed once, this court declines Plaintiffs' invitation for a second opportunity.

Plaintiffs also assert that the district court in *Commonwealth of Virginia* was reversed only because the district court examined the merits of the federal regulation. *See Commonwealth of Virginia*, 741 F.2d at 40. However, as stated above, this was not the extent of the Fourth Circuit's rationale. Also, Plaintiffs ignore the court's statement that federal question jurisdiction cannot be invoked to avoid 30 U.S.C. § 1276(a)(1). To do so would create conflicts among various district courts concerning the validity of the federal regulations and would impair or prevent the establishment of nationally uniform minimum standards. *Id.* at 41.

Plaintiffs assert that their position is supported by the statement in *Clinchfield* that "district court does have jurisdiction . . . so long as it does not take into consideration the merits of the federal regulation." *Clinchfield*, 802 F.2d at 103-04. However, in *Clinchfield*, the district court was not addressing constitutional claims. *Clinchfield Coal Co. v. Hodel*, 640 F.Supp. 334 (W.D.Va.1985), *rev'd sub nom. Clinchfield Coal Co. v. DOI*, 802 F.2d 102 (4th Cir.1986). The above statement means only that a district court can hear challenges to an interpretation placed on a regulation, but

not challenges to the regulation itself. *See United States v. S.S. (Joe) Burford, Inc.*, 761 F.2d 173, 174-75 (4th Cir.1985) (court had jurisdiction to interpret SMCRA where it was conceded that validity of regulation was not questioned). Plaintiffs' claim falls into this latter category and cannot be heard in this circuit.

Finally, Plaintiffs assert that the District Court for the District of Columbia "expressly rejects" jurisdiction over challenges to the constitutionality of a regulation as applied. *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1307 (D.C.1978), *rev'd in part, aff'd in part*, 627 F.2d 1346 (D.C.Cir.1980). Plaintiffs have misconstrued that decision. There, the court stated that "[r]eview of application of the regulations is limited by statute to the district court for the district 'in which the surface coal mining operation is located' " *Id.* This does not support Plaintiffs' position. Plaintiffs do not assert that OSM is misapplying the rules. Instead, Plaintiffs claim that, even though the rules are correctly applied, that application results in a violation of procedural due process. As previously stated, the Fourth Circuit rejected such an argument in *Commonwealth of Virginia.*

Accordingly, the court finds that this action cannot be brought in this forum. Therefore, the court grants Defendants' motion for summary judgment.

Conclusion

For the foregoing reasons, the court grants Defendants' motion to dismiss for lack of subject matter jurisdiction. The court hereby denies Plaintiffs' motion for entry of a permanent injunction. The court will not enter

a final order until Plaintiffs advise whether they desire this case be transferred to the United States District Court for the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE PITTSTON COMPANY, ET AL.	)	CIVIL ACTION NO. 91-0006-A
v.	)	**ORDER**
MANUEL LUJAN, JR., Secretary of the Interior, ET AL.	)	(Filed May 11, 1992)

In accordance with the Memorandum Opinion heretofore entered, this case is dismissed for lack of jurisdiction; however, on motion of the plaintiff for a stay pending appeal, it is ADJUDGED and ORDERED that the preliminary injunction heretofore entered in this case shall remain in full force pending appeal. This case is stricken from the docket of this Court.

ENTER: This 11th day of May, 1992.

/s/ Glen M. Williams
SENIOR U.S.
DISTRICT JUDGE
A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: /s/ A. Cook
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Abingdon Division

THE PITTSTON COMPANY, a Virginia corporation and CLINCHFIELD COAL COMPANY, a Virginia corporation, Plaintiffs, vs MANUEL LUJAN, JR., and COMMONWEALTH OF VIRGINIA, Defendants.	Civil Action No. 91-6-A

ORDER

(Filed Febr. 8, 1991)

This action is before the Court on plaintiffs' request for preliminary injunction.

The Court has jurisdicition [sic] under 28 U.S.C. § 1331. Plaintiffs allege that the Government's attempt to compel them to abate violations of other entities violates due process. Plaintiffs maintain that they are not bound by fines and penalties against their contractors in proceedings to which they were not parties. Plaintiffs have not challanged [sic] any national rules or regulations, and this Court does not rule upon any said rules or regulations, or the merits of any such rules or regulations are not before the Court. Therefore, this action does not have

to be brought in the District of Colombia as alleged by defendants. *Cf.* 30 U.S.C. § 1276 (a)(1).

Upon consideration of the record and evidence presented, the Court finds that all parties are properly before the Court and have been actually notified of the hearing and given an opportunity to present evidence. The Court further finds that there is substantial likelihood that plaintiffs will prevail on the merits of this case. The fines and penalties which the Government demands payment resulted from proceedings to which the plaintiffs were not parties and did not have proper notice or opportunity to defend. Therefore, plaintiffs are not bound by the prior proceedings. Moreover, plaintiffs cannot constitutionally be so bound. The relief sought by the plaintiffs will not adversely affect the public health or safety, or cause significant environmental harm to land, air, or water resources. The Government is attempting to collect fines and penalties that have been outstanding a number of years. The standards set forth in *Virginia Surface Mining Reclamation Association v. Andrus,* 604 F.2d 312 (4th Cir. 1979), have been fully met. Alternatively, the plaintiffs have also met the standards set forth in *Blackwelder Furniture Company v. Seilig Manufacturing Company,* 550 F.2d 189 (4th Cir. 1977). If applicable, the balance of hardship is decided in the plaintiffs' favor because the plaintiffs would be handicapped in continuing in business. The interests of the public in maintaining employment and tax revenues is also in favor of injunctive relief.

Defendants, their agents and servants are hereby enjoined until further order of the Court in this suit from directly or indirectly requiring Pittston or Clinchfield to abate unabated cessation orders, unpaid civil penalties,

unpaid abandoned mine land fees or forfeited state bonds heretofore assessed against Golden Chip Coal Company, Delight Coal Company, Fadco, Inc., and Elkins Energy Corporation until such time as defendants have given to the plaintiffs a due process hearing with adequate notice of the offense and an independent determination as to whether the plaintiffs have violated any statutes or laws, and whether any penalty or fine is owed by them.

This preliminary injunction shall remain in effect until further order of the Court.

The Court requires no security on a bond in the amount of $500 which shall be entered into by the plaintiff.

ENTERED this 8 day of February, 1991, at Abingdon, Va. at 4:00 p.m. *nunc pro tunc* to 6th day of February, 1991.

/s/ Glen M. Williams
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE PITTSTON COMPANY and CLINCHFIELD COAL COMPANY, Plaintiffs, v. MANUEL LUJAN, JR., Secretary Department of the Interior and COMMONWEALTH OF VIRGINIA, Defendants.	CIVIL ACTION NO. 91-0006-A MEMORANDUM OPINION (Filed Febr. 24, 1992)

On February 8, 1991, this court entered a preliminary injunction preventing defendants from requiring the Pittston Company ("Pittston") or Clinchfield Coal Company ("Clinchfield") to abate unabated cessation orders, unpaid civil penalties, unpaid abandoned mine land fees ("AML fees"), or forfeited state bonds of certain coal companies, known as contract miners, which admittedly were under the ownership or control of Pittston. This injunction barred such action until defendants had given plaintiffs a due process hearing with adequate notice of the violations and an independent determination as to whether plaintiffs had violated any statutes or laws or whether they owed any penalty or fine. Defendants appealed the Order to the United States Court of Appeals for the Fourth Circuit. However, the defendants voluntarily withdrew the appeal and an order was entered dismissing the appeal on August 13, 1991. On November

27, 1991, defendants filed a motion for summary judgment and, on December 27, 1991, plaintiffs filed a motion for entry of a permanent injunction. While the court was awaiting final briefing by the parties, plaintiffs again appeared before the court with a motion to expand the preliminary injunction based upon additional actions taken by the defendants and their agents. The court held evidentiary hearings on January 22, 1992 and February 10, 1992.

In their motion to expand the preliminary injunction, plaintiffs alleged that the Office of Surface Mining Reclamation and Enforcement ("OSM"), by letter dated January 24, 1992, claimed that Pittston or its subsidiaries owed certain delinquent AML fees for Ranger Fuel Corporation and North Star Coal Company ("North Star"). The letter warned that failure to pay these fees could result in a total ban on further mining permits in any state. At the hearings on the motion, the evidence showed that Ranger Fuel, a subsidiary of Pittston, was the permittee and had allowed North Star to mine on its permits and had leased North Star equipment. Plaintiffs stated that the letter constituted due process notice. They now ask that the preliminary injunction be expanded to embrace other operations of the OSM in West Virginia and Kentucky as well as Virginia until OSM has given them a hearing to determine their responsibility for the AML fees. Defendants have moved to dismiss the motion for an expanded preliminary injunction by alleging that plaintiffs have other remedies available and should bring a suit in West Virginia concerning the AML fees. The court finds that the issue involved in the motion to

expand the preliminary injunction is exactly the same issue as that raised in plaintiff's complaint.

OSM developed and started a computer system in October, 1988 to coordinate all the applicant violator system ("AVS") functions. The system actually went into operation approximately one and a half years ago. Defendant submitted the affidavit of Annetta L. Cheek in support of its motion for summary judgment. According to Cheek, the AVS is a computerized data base that assists in implementing Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). 30 U.S.C. § 1260(c). This section states that no new permits shall be issued to companies with outstanding violations or to companies which own or control operations with outstanding violations. *Id.* The practical effect of the AVS is that, if a company's name appears on the computer as having an outstanding violation against it or against an operation which it owns or controls, then that company cannot obtain any new mining permits until the matter is resolved to OSM's satisfaction.

In its complaint, Pittston alleged that it did not receive notice or have an opportunity to be heard when the alleged infractions occurred and a cessation order or notice of violation was issued against the contractor miners. Pittston admits that it owned the coal which was being mined by the contractor miners. However, Pittston maintains that, at the time of the violations, it neither had the opportunity to contest any alleged violation nor to abate any wrongdoing. The companies involved have long since gone out of business and most are bankrupt. Therefore, Pittston has no means of redress against the

companies and, for that matter, neither does OSM. Pittston contends that, if it had been given notice or a hearing, it would have had the opportunity to determine whether any violation had ever occurred, and that in many instances if one had occurred, it could have been abated very simply. Accordingly, if indeed a violation occurred and Pittston was responsible, it could have long since been remedied. On the other hand, OSM's [sic] asserts that the only issue is whether Pittston owned or controlled the contract miners and that Pittston is not entitled to any hearing on the merits of the underlying violations.

Therefore, the ultimate question raised in both the complaint and the motion to expand the preliminary injunction is whether the statute itself, as interpreted and enforced by the defendants, is unconstitutional because defendants are attempting to block plaintiffs without prior notice and a hearing. This is not a case in which an emergency exists on the part of the government to prevent some dangerous, imminent environmental harm. The evidence shows that these violations occurred years ago and no great environmental harm is done by conducting a hearing. Nor does this case involve a situation where the government has to take an emergency action and a person is entitled to a post-deprivation hearing. The issue involved here is whether plaintiffs are entitled to a hearing at all. In other words, can the government proceed to block plaintiffs from obtaining permits without giving them a hearing on the underlying issue of whether the law was ever violated.

This court has already expressed the opinion that the denial of notice and right to a hearing before an impartial

judge is a violation of constitutional due process of law and the court has enjoined OSM from blocking plaintiffs from receiving permits until OSM has given plaintiffs an opportunity to contest the underlying violations. Defendants have presented no evidence whatsoever that they cannot give plaintiffs such a hearing.[1] On the contrary, Cheek stated, "The validity of AML fee assessment may be reviewed in a collection action brought by the United States pursuant to 30 U.S.C. section 1232(e). . . . " (Cheek affidavit at 5).

In order to avoid a multiplicity of suits, the court sees no reason why plaintiffs cannot petition this court to expand the existing injunction to prevent defendants from taking actions, which have already been enjoined in Virginia, against them in other states. It is not unusual for a federal court, rather than having the same parties resort to a multiplicity of suits, to combine all the causes in one court. Indeed, if a separate suit were filed, it could and should be ordered to be brought into this court so that all the issues between the parties could be determined.

For this reason, the court will enter an order expanding the preliminary injunction to include an order that OSM shall not block plaintiffs from obtaining permits during the pendency of this order unless and until it has

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[1] At the close of the February 10, 1992 hearing, the court instructed the parties to submit evidence within ten days showing whether Pittston was presently blocked in West Virginia. On February 20, 1992, Pittston filed an affidavit stating that OSM had refused to divulge their permit status over the telephone. Instead, OSM had stated that Pittston must file a request under the Freedom of Information Act. The court has heard nothing from the defendants on this matter.

given Pittston notice and an opportunity to be heard on the underlying violations. An Order will be entered to this effect.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 24th day of February, 1992.

/s/ Glen M. Williams
SENIOR UNITED
STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE PITTSTON COMPANY and CLINCHFIELD COAL COMPANY, Plaintiffs, v. MANUEL LUJAN, JR., Secretary Department of the Interior and COMMONWEALTH OF VIRGINIA, Defendants.	)	CIVIL ACTION NO. 91-0006-A MEMORANDUM OPINION (Filed Febr. 24, 1992)

For the reasons stated in the Memorandum Opinion entered this day, the defendants, their agents and servants are hereby enjoined until further order of this court in this suit from directing [sic] or indirectly requiring Pittston or Clinchfield to abate unabated cessation orders, unpaid civil penalties, unpaid abandoned mine land fees, or forfeited state bonds which have heretofore been assessed against any company which OSM alleges is owned or controlled by Pittston and/or Clinchfield or their subsidiaries. This injunction shall apply whether the said violations have been in West Virginia, Kentucky, Virginia or any other state in the Union and until such time as the defendants have given the plaintiffs a due process hearing with adequate notice of the offense and an independent determination as to whether the plaintiffs have violated any statutes or laws and whether any penalty or fine is owed by them. This expanded preliminary

injunction shall remain in effect until further order of the court.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 24th day of February, 1992.

/s/ Glen M. Williams
SENIOR UNITED
STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 11, 1995

No. 92-1606
CA-91-6-A

THE PITTSTON COAL COMPANY;
CLINCHFIELD COAL COMPANY

Plaintiffs - Appellants

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; COMMONWEALTH OF VIRGINIA, Department of Mines, Minerals & Energy, Division of Mine[d] Land Reclamation

Defendants - Appellees

ORDER

Appellants have filed a motion to stay the mandate, and a motion to transfer the case to the United States District Court for the District of Columbia. The Secretary has filed a motion to lift the lower court's injunction.

The Court grants the motion to stay the mandate and stays the issuance of the mandate for thirty days, until January 10, 1996, to permit the filing of a petition for writ of certiorari with the United States Supreme Court.

The Court takes under advisement appellants' motion to transfer and the Secretary's motion to lift the injunction pending review by the United States Supreme Court.

Entered at the direction of Judge Hamilton, with the concurrence of Judge Russell and Judge Wilkins.

FOR THE COURT

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 11, 1995

No. 92-1606
CA-91-6-A

THE PITTSTON COAL COMPANY;
CLINCHFIELD COAL COMPANY

Plaintiffs - Appellants

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR;
COMMONWEALTH OF VIRGINIA,
Department of Mines, Minerals & Energy,
Division of Mine[d] Land Reclamation

Defendants - Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

30 U.S.C. § 1260(c)

(c) The applicant shall file with his permit application a schedule listing any and all notices of violations of this Act and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act.

30 U.S.C. § 1276(a)

(1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this Act shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 [30 U.S.C. §§ 1251, 1265, 1266, and 1273] shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

(2) Any order or decision issued by the Secretary in a civil penalty proceeding or any other proceeding required to be conducted pursuant to 5 U.S.C. § 554 (1970) shall be

subject to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the district in which the surface coal mining operation is located. In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this Act, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. This availability of review established in this subsection shall not be construed to limit the operations of rights established in Section 520 [30 U.S.C. § 1270].

30 C.F.R. § 773.5

For purposes of this subchapter:

Owned or controlled and *owns or controls* mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition –

(a)(1) Being a permittee of a surface coal mining operation; (2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner in a partnership;

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

30 C.F.R. § 773.15(b) (1991)

(b) *Review of violations.* (1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties issued pursuant to section 518 of the Act, bond forfeitures where violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph.

30 C.F.R. § 773.15(b) (1995)

(b) *Review of violations.* (1) Based on a review of all reasonably available information concerning violation notices and ownership or control links involving the applicant, including information obtained pursuant to §§ 773.22, 773.23, 778.13, and 778.14 of this chapter, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act, any Federal rule or regulation promulgated pursuant thereto, a State program, or any Federal or State law, rule, or regulation pertaining to air or water environmental protection.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

THE PITTSTON COMPANY, a Virginia corporation, and CLINCHFIELD COAL COMPANY, a Virginia corporation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-0006-A
MANUEL LUJAN, JR., Secretary of the Interior United States Department of Interior Washington, D.C. 20240;	)	
and	)	
COMMONWEALTH OF VIRGINIA Department of Mines, Minerals & Energy, Division of Mined Land Reclamation Big Stone Gap, VA 24219,	)	
Defendants.	)	

COMPLAINT

(Filed Jan. 18, 1991)

Plaintiffs, The Pittston Company and Clinchfield Coal Company, by counsel, for their complaint, respectfully state as follows:

1. The Pittston Company (Pittston) is a Virginia corporation, with its principal place of business in Greenwich, Connecticut. Clinchfield Coal Company (Clinchfield) is a Virginia corporation with its principal

place of business in Lebanon, Virginia. Clinchfield is an indirect wholly-owned subsidiary of Pittston.

2. Clinchfield is engaged in the business of mining, processing, and selling coal in Virginia. Clinchfield also hires independent contractors, known in the business as "contract miners," who mine for the company.

3. Manuel Lujan, Jr. is Secretary of the United States Department of Interior, which, through the Office of Surface Mining Reclamation Enforcement (OSM), administers the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, and promulgates regulations governing surface coal mining in Virginia and other states.

4. The Commonwealth of Virginia, through its Department of Mines, Minerals and Energy and Division of Mined Land Reclamation (DMLR), obtained federal approval in 1981 as the primary regulatory authority and issuer of permits for surface coal mining in this state, with the Secretary, though [sic] OSM, retaining certain oversight authority.

5. Jurisdiction is founded upon the existence of federal questions, 28 U.S.C. § 1331.

6. At certain times from the late 1970's to mid-1980's, Golden Chip Coal, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy Company were contract miners for Clinchfield at locations in Southwest Virginia. These contractors were independently owned and operated and held their own permits from OSM and DMLR to conduct surface coal mining at these sites, as required by law.

7. These contractors have not conducted mining operations on Clinchfield's property for five to ten years. To plaintiffs' knowledge, the contractors no longer have any business or assets. One or more has been discharged under bankruptcy laws, and all have been dissolved by the Virginia State Corporation Commission.

8. According to OSM, these contractors collectively owe OSM several hundred thousand dollars in unpaid fines and penalties assessed against them for violations of the surface mining laws. Plaintiffs did not commit, were not charged with, and are not liable for any of these violations, and enforcement of the fines and penalties against plaintiffs is barred by the statute of limitations.

9. Nevertheless, OSM has notified plaintiffs that all future permits sought by them or their associates or affiliates will be "blocked" on January 25, 1991, unless plaintiffs pay the fines and penalties allegedly owed to OSM by these contractors. This controversy arises as follows.

10. In 1988 and 1989, OSM implemented a program known as the Applicant Violator System (AVS). The AVS program blocks new permits if any surface coal mining operation "owned or controlled by the applicant or by any person who owns or controls the applicant" is currently in violation of the surface mining laws. 30 C.F.R. §§ 773.15(b), 773.20, 773.21. Control is broadly defined and presumed, *inter alia*, in the case of an applicant "[o]wning or controlling coal to be mined by another person under a . . . contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another

person conducts a surface coal mining operation." 30 C.F.R. § 773.5. These regulations were not in effect until some years after the contractor fines and penalties in question.

11. OSM has a computer which it uses to "link" applicants with violators and those alleged to own or control violators. Once a company is "linked" by the computer with a violator that company and anyone that it owns or controls are blocked from obtaining new permits anywhere in the United States and are subject to have their existing permits rescinded as "improvidently granted." Although OSM has admitted that much of the information in the computer is inaccurate or incomplete, it requires DMLR and the authorities in other states to consult the computer when permits are sought and to block permits where so-called "linkage" with past violations is shown.

12. When such linkage appears from the computer, the applicant's permits are blocked even though the applicant is not legally liable for the fines and penalties assessed against the violator. In this case, OSM threatens to block plaintiffs' permits even though plaintiffs were not parties to the prior actions against the contractors and did not have proper notice of or an opportunity to contest either the underlying violations or the penalties assessed therefor. In fact, all of the violations and resulting fines and other liabilities of the contractors arose prior to the effective date of the AVS program and regulations. According to information obtained from OSM, many of the unpaid contractor penalties were assessed more than ten years ago.

13. By letter dated December 20, 1990, a copy of which is attached as Exhibit 1, OSM notified Pittston that OSM had determined that Pittston, through Clinchfield, "controls" the four contractors named above. The letter states that on January 18, 1991, OSM will "update" the computer to show "linkage" with these contractors and thereby block Pittston and its associates and affiliates from obtaining new permits "unless (1) each violation to which the The Pittston Company is linked has been abated to the satisfaction of the Agency that has jurisdiction over such violation, (2) an agreement to resolve such violation has been entered into and is being implemented, or (3) OSM's determination of ownership and control has been successfully rebutted." Earlier this month, OSM extended the deadline to January 25, 1991.

14. As noted, OSM intends to take this action against plaintiffs although plaintiffs were not parties to the prior proceedings and were not afforded the notice and hearing that due process demands for the underlying violations and other charges for which OSM seeks payment. The proposed action by OSM would deprive plaintiffs of a valuable property right and violate due process under the United States Constitution as well as federal common law.

15. Many years have passed since the alleged violations occurred. The passage of time has prejudiced plaintiffs in any attempt to seek compliance, recoupment, or indemnity from the violators – now no longer in business. In addition, it is likely that important witnesses and evidence have been lost, preventing any meaningful opportunity to defend the claims.

16. The prejudice to plaintiffs precludes any effective notice or opportunity to be heard at this time. The Court should permanently bar defendants from blocking permits to plaintiffs or otherwise enforcing the violations and other contractor liabilities against plaintiffs and grant the plaintiffs such other injunctive relief as due process and the law demand.

17. If defendants are allowed to block plaintiffs and their associates and affiliates from obtaining permits, plaintiffs will be irreparably harmed because plaintiffs' business is dependent upon obtaining permits for new mines to replace exhausted operations and upon renewing and revising existing permits to meet operational needs and continue active operations. Within the next few months, plaintiffs and their associates and affiliates have at least ten new mines that need permits and dozens of existing mines that have to have their permits renewed. If these permits are blocked, hundreds of jobs will be lost and plaintiffs and the communities in which they operate will suffer massive economic losses. Plaintiffs have no adequate remedy at law. Defendants will not be harmed by issuance of an injunction.

WHEREFORE, plaintiffs pray that the Court grant them a temporary restraining order and a preliminary and permanent injunction enjoining defendants and their officers, agents, servants, employees, and attorneys, and all others in active concert or participation with them:

– From blocking plaintiffs or their associates or affiliates from obtaining surface mining permits based on violations or other liabilities of Golden

Chip Coal, Inc., Fadco, Inc., Delight Coal Corporation, or Elkins Energy Company or any other contractor of plaintiffs;

– From refusing to renew or rescinding existing permits of plaintiffs or their associates or affiliates on account of violations or other liabilities of any such contractors;

– From otherwise linking plaintiffs or their associates or affiliates with any violations or other liabilities of any such contractors;

and for such other relief as due process and the law demand or the nature of the case may require.

A TRIAL BY JURY IS DEMANDED ON ALL ISSUES SO TRIABLE.

THE PITTSTON COMPANY
CLINCHFIELD COAL COMPANY

By Counsel

Stephen M. Hodges
Wade W. Massie
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Abingdon, Virginia 24210

By /s/ Stephen M. Hodges
Stephen M. Hodges

John R. Woodrum
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Suite 400
1110 Vermont Avenue, N.W.
Washington, D.C. 20005-3593

VERIFICATION

STATE OF VIRGINIA

COUNTY OF WASHINGTON

John Bryan, first being duly sworn, deposes and states that he is Director of Environmental Affairs for Pittston Coal Management Company, a company affiliated with plaintiffs, that he has been involved in establishing and overseeing environmental policy for Clinchfield Coal Company for the last 21 years, including relations with OSM and DMLR, that he has read the complaint in this action and is familiar with the factual allegations contained therein and the underlying controversy between the parties, and that the allegations in the complaint are true to the best of his knowledge, information, and belief.

Given under my hand this 18th day of January, 1991.

/s/ John Bryan
John Bryan

Subscribed and sworn to before me this 18th day of January, 1991, by John Bryan.

/s/ Phyllis Fields
Notary Public

My commission expires: June 30, 1993

[seal]

United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240

DEC 20 1990

Mr. Garold Spinder
The Pittston Company
One Pickwick Plaza
Greenwich, CT 06830

Dear Mr. Spinder:

The Office of Surface Mining Reclamation and Enforcement (OSM) has conducted an investigation into the ownership and control of Golden Chip Coal Company, Inc., Delight Coal Corporation, Fadco, Inc., and Elkins Energy Corporation. The criteria for determining ownership and control are those contained in the definition of "owned or controlled" and "owns and controls" at 30 CFR 773.5. Among those criteria are the following provisions relating to contract mining relationships:

> Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having the authority to determine the manner in which that person or another person conducts a surface coal mining operation. (30 CFR 773.5(b)(6))

Using these definitions, OSM has reason to believe that The Pittston Company, through the Clinchfield Coal Company, controls Golden Chip Coal Company, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy

Corporation. Enclosed is the information upon which OSM has based this determination.

OSM's records indicate that Golden Chip Coal Company, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy Corporation have outstanding violations of the Surface Mining Control and Reclamation Act (SMCRA), and that they are blocked from obtaining permits pursuant to 30 CFR 773.15(b). For purposes of the Applicant/Violator System (AVS), the term violation includes unabated cessation orders, unpaid civil penalties, unpaid abandoned mine land fees, and forfeited State bonds. Once OSM updates the information in the AVS to reflect the ownership or control linkage between The Pittston Company and Golden Chip Coal Company, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy Corporation, The Pittston Company will also be blocked from obtaining permits unless (1) each violation to which The Pittston Company is linked has been abated to the satisfaction of the Agency that has jurisdiction over such violation, (2) an agreement to resolve such violation has been entered into and is being implemented, or (3) OSM's determination of ownership and control has been successfully rebutted. All of the owners and controllers of Pittston, plus any other companies it owns or controls, will be blocked also.

OSM is continuing to investigate the ownership and control of all persons with outstanding violations. It is possible that The Pittston Company will be determined to own and control persons with violations in addition to those named above. Each time such violations are discovered, you could be subject to a permit block under 30 CFR 733.15(b) and required to abate such violations to remove

the block, if you are unable to rebut the linkage to the violator.

If you wish to rebut OSM's ownership and control determination, before a final determination is made, or if you wish to enter into an abatement agreement with respect to the specific violators named above, please contact Dr. Annetta Cheek, Chief, Applicant/Violator System Office, at 202-208-4654. Alternatively, you may wish to enter into a comprehensive agreement with respect to all of your contractors. If you do not respond by January 18, 1991, the AVS system will be updated using the information obtained in OSM's investigation.

If you have any questions about this letter or wish to discuss this matter further, you should call Dr. Cheek of OSM at the number listed above.

Sincerely,

/s/ Annetta L Cheek
Dr. Annetta Cheek
Chief, Applicant/Violator
System Office

Enclosures

cc: OSM Subject
OSM Reading (2)
AVSO Reading
PSB Chron
PSB Reading
AVSO Field Investigations Unit
DSM: Harvey Blank
AVSO:RFrum:rf:spindler.bp:208-4421

bcc: CIMS
Director
Deputy Director
AVSO
SOL – R. More
FOD, BSG
AVSFIB
OSM:AVSFIB:BStein/DBeam:ch:12/19/90:355-2795(4004/AVS-6)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE PITTSTON COMPANY, et al,	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	91-0006-A
MANUEL LUJAN, JR., etc., et al	)	
	)	
Defendants.	)	

STIPULATION

(Filed Feb. 6, 1991)

For purposes of the preliminary injunction hearing, the parties stipulate the following:

1. During the times Golden Chip Coal Company, Inc., Fadco, Inc., Delight Coal Corporation, and Elkins Energy Corporation ("the Contractors") mined for Clinchfield, Clinchfield owned or leased the coal being mined by the Contractors and, pursuant to contracts with them, had the right to receive the coal after mining.

2. Plaintiffs were not named in the underlying notices or orders nor did they receive notice from defendants concerning the underlying proceedings against the Contractors giving rise to the fines and penalties in question, and plaintiffs were not parties to and did not participate in those proceedings.

This stipulation entered this 6th day of February, 1991.

/s/ Stephen M. Hodges
Counsel for Plaintiffs

/s/ Charles P. Gault
Counsel for Manuel Lujan,
Secretary of the Interior

/s/ Michael Lepchitz
Counsel for Commonwealth
of Virginia

TRANSCRIPT OF HEARING ON
PRELIMINARY INJUNCTION
February 6, 1991

* * *

[p. 3] JOHN BRYAN, PLAINTIFFS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MASSIE:

* * *

[p. 4] Q [I]s Clinchfield one of the companies that you do work for in your job?

A Yes.

Q Where does Clinchfield operate?

A Their offices are in Dante, and they have mining operations in the coal counties of Southwest Virginia.

[p. 5] Q Does Clinchfield own or lease the coal tracts in various counties in Southwest Virginia, Russell, Dickenson, Wise, Buchanan?

A Yes.

Q Does it operate mines with its own employees?

A Yes.

Q Does it sometimes engage independent contractors to mine coal for it?

A Yes.

Q Were Golden Chip Coal Company, Delight Coal Company, FADCO . . . , Inc., and Elkins Energy Corporation all contractors for Clinchfield at one time?

A Yes, they were.

Q During what period of time?

A Late seventies, early to mid-eighties.

Q Did they all operate under their own mining permits?

A Yes.

Q Do any of them currently work for Clinchfield?

A No.

Q Do they have any other association with the plaintiffs in this case?

A Not to my knowledge.

Q When did OSM first make any demand that the plaintiffs need money on account of these contractors?

A I believe December 27, 1990.

* * *

[p. 6] Q Has OSM given you a list of what it contends is owed by these various contractors and what the company plaintiffs in this case are being asked to pay?

[p. 7] A Yes, they have.

Q I'll show you what's been marked as Plaintiffs' Exhibit Two. Do you recognize that document?

A Yes, sir.

Q Is that a document, is that a list of the fines and penalties that OSM has demanded payment of?

A Yes, it is.

MR. MASSIE: We offer Plaintiffs' Exhibit Two.

THE COURT: Exhibit Two will be introduced.

BY MR. MASSIE (Resuming):

* * *

Q In just looking at the numbers it has here, it has, first it has each contractor's name, Elkins Energy Corporation, and then it has a series of numbers, and then an amount by each number, and then a total. Do you know what those numbers represent, sir?

A Well, the first group of numbers indicates the year that inspection was made, and the inspector who did the inspection, whether it was [a] CO or NOV.

Q And what can you tell us about the age of these penalties from this exhibit?

A Well, they occurred, the majority of them occurred in the [p. 8] early days of the surface mine at seventy-eight, seventy-nine, up through the mid-eighties.

Q Now, they have various amounts on here, too, Mr. Bryan, each of the numbers that you just described, either C80 or N76, and then it has a dollar sign and an amount next to that. Can you tell us anything about the significance of these amounts?

A Well, the most glaring thing is that apparently somebody didn't pay attention. The $22,500 assessment

should have, I would have thought that no one would have ever allowed those to reach that point. There are procedures that you could have stopped those at $750, I think.

* * *

Q Now, we have a stipulation in this case that's been offered to the Court concerning the lack of notice to plaintiffs of these underlying penalties and violations. Have you told OSM that you didn't have notice of these charges or an opportunity to defend them?

A Yes, sir.

Q What was their response?

A That's tough.

Q Were you expected to pay the fines anyway without such [p. 9] notice or opportunity to be heard?

A I think that's their intention.

Q What happens if you don't?

A Well, if you don't, our permits are blocked according to the letter.

* * *

Q Has Pittston or Clinchfield ever incurred fines of this magnitude itself?

A Not to my knowledge, no.

* * *

[p. 32] AN[N]ET[T]A CHEEK, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. GAULT:

Q Ms. Cheek, what is your present employment?

A I'm the chief of the Applicant Violator System Office in the Office of Surface Mining.

* * *

[p. 39] Q Have you had discussions with representatives of Clinchfield Coal Company concerning this situation of, of them [p. 40] being possibly linked by control to companies with outstanding violations?

A Yes.

Q Do those discussions, were those discussions initiated by this letter, or when were they initiated?

A The discussions were initiated before the letter. The company called us and asked to come in and discuss with us any potential problems that they might have with contractors with outstanding violations.

Q What did you tell the company would be the scope of the issues that you would be willing to discuss with them?

A We would be happy to discuss anything they wanted to discuss, basically.

Q Did you prevent them or tell them that you would not listen to any discussion concerning the underlying violations or civil penalties that the contractor companies had already accumulated?

A No.

Q During these discussions, did Clinchfield Coal Company submit to you any information concerning the rebutting of the presumption that you had made?

A No, they did not submit any information.

Q During your discussions with Clinchfield, did it at any time ever deny that it had a contractural [sic] relationship with the, with the companies that had outstanding violations?

[p. 41] A No, they did not.

* * *

[p. 43] CROSS EXAMINATION

BY MR. HODGES:

* * *

[p. 45] Q I'm sure the Court understands when this letter goes out, then there can be some communication with the company, and the company can come and talk and so forth?

A Right.

Q And one of the things, certainly the primary thing the company can do is talk about whether this information about this linkage is accurate or inaccurate; is that right?

[p. 46] A That's correct.

Q You invite them to do that and you, in fact, invited them to do that in this letter that you sent?

A That's correct.

Q Do you invite them to have a procedure to test the validity of the offense no matter when it occurred, the supposed violation of the surface mine law that led to the penalties in the first place?

A My office does not.

Q Who does?

A I assume it would be in the programs policy in the area in the agency, and I don't know anything about that.

Q Well, I don't want you to assume. I want you to tell this Court does this company have that right, once this letter goes out, to go before anybody in your agency and have a hearing as to whether these violations ever occurred, or as to whether these penalties were properly imposed or are in a proper amount?

A I can't answer that. I don't know.

Q Did you ever offer this company the opportunity to do that in your discussions?

A No, I did not.

* * *

[p. 47] Q [H]as anybody ever gotten anything changed because the offense, the violation, whenever it was, was wrong?

A I don't know that. That's not part of the process that I oversee.

* * *

Q All right. Now, you said when these people, Mr. Bryan and other people come up to talk to you, they can talk about anything they want to?

A That's right.

Q They can sit there and, I guess up to a certain limit, I know you're a busy person, but up to a certain limit they can say we don't know about these violations; we don't know if they occurred, and you wouldn't cut them off, and you wouldn't [p. 48] say I won't listen to anything; is that what you're telling the Court?

A That's correct.

Q Well, what good would it do them to tell you something like that, Ms. Cheek?

A It may, during those discussions, it may develop that they do have information that would rebut their control over those violations, which is something that certainly interests my office.

Q So, if they want to talk about whether the violation even occurred, whether anybody even committed a violation, the only interest that would be to you is if it would maybe slip over into some facts that had to do with this elaborate pattern of linkage, and that's what you're concerned with; is that correct?

A That's correct.

Q The rest of it wouldn't matter to you because you couldn't do a darn thing about it?

A That's correct.

Q All right. Ms. Cheek, your letter, do you have it in front of you there?

A Yeah.

Q You might pick it up. I believe it's Exhibit One. This document, in effect, as I read it, and see if I'm correct, says the company can do one of several things, and it says, [p. 49] and I'm near the bottom of the first page, it says the Pittston Company will also be blocked from obtaining permits unless each violation to which the Pittston Company is linked has been abated to the satisfaction of the agency that has jurisdiction over such violation. In this particular case that we're here in Court on today, OSM is the agency that has jurisdiction; is that right?

A That's correct.

Q What do you mean by abated in that context?

A Well, this, you need to realize, this is a general letter that goes out to any of the companies that are, that get involved in this process.

Q Well, what did it mean in this case? It went to a particular company?

A In this case it would mean that the civil penalties were paid, or any outstanding reclamation was accomplished, or any due AML fees were paid.

Q It means all three of those?

A Yes.

Q So, this blockage problem, you told them in this letter, wasn't going to go away unless all of the civil

penalties, which you admit were never imposed on them, were paid in full; is that right?

A The problem would not go away unless the civil penalties were paid in full.

PLAINTIFF'S EXHIBIT
2
91-6-A

CIVIL PENALTIES OWED BY CLINCHFIELD/
PITTSTON CONTRACTORS

ELKINS ENERGY CORPORATION

C80-1-18-4	$23,250
C80-1-18-5	PAID
N78-1-17-15	$ 2,500
N79-1-47-46	PAID
N81-1-47-10	PAID
N80-1-18-5	PAID
N80-1-66-3	$ 1,500
TOTAL	$27,250

FADCO INCORPORATED

C79-1-18-2	$22,500
N78-1-26-5	$ 2,200
TOTAL	$24,700

DELIGHT COAL CORPORATION

C78-1-18-1	PAID
C79-1-18-6	$22,500
C79-1-66-1	$22,500
C78-1-18-6	$22,500
N78-1-17-3	PAID
N79-1-18-35	$ 1,300
TOTAL	$68,800

GOLDEN CHIP COAL COMPANY

C84-13-288-2	$ 750
C83-13-47-1	$ 3,500
N80-1-43-19	$ 700
N84-13-285-2	$ 440
N85-13-288-1	$ 1,500

N85-130288-11	$ 1,800
N86-132-423-3	$ 1,400
N86-13-288-4	$ 1,400
N86-13-288-6	$ 440
C86-13-288-2	$ 22,500
N86-13-288-7	$ 1,500
N87-13-288-1	$ 1,500
C86-13-288-3	$ 22,500
C87-13-288-1	$ 22,500
N87-13-288-3	$ 460
N87-13-288-4	$ 460
C87-13-288-3	$ 22,500
C87-13-288-4	$ 22,500
C87-13-288-5	$ 22,500
C87-13-288-6	$ 22,500
TOTAL	$173,350
GRAND TOTAL	$294,100
	90,000 + interest
	Total @ $400,000

Exhibit B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Abingdon Division

THE PITTSTON COMPANY, et al., Plaintiffs, vs. MANUEL LUJAN, JR., et al., Defendants.	Civil Action No. 91-6-A

AFFIDAVIT OF ANNETTA L. CHEEK

Annetta L. Cheek, being first duly sworn, deposes and says as follows:

1. I am the Chief of the Applicant/Violator System Office (AVSO) of the Office of Surface Mining Reclamation and Enforcement (OSM) in the United States Department of the Interior. I have held this position since February 1990. Within OSM I have also held the positions of Historic Preservation Officer, Special Assistant to the Director, and Chief of the Office of Regulatory Development and Issues Management.

2. As part of my duties as Chief of the AVSO, I am responsible for implementing the procedures and effectuating the policies set forth in applicable regulations and directives for the review of permit applications under section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. section 1260(c).

Such responsibilities include the development, maintenance, and operation of OSM's systems and procedures designed to assure that no surface coal mining permits are issued to applicants linked by ownership or control to outstanding violations of surface mining laws and regulations.

A. AVS AND THE SECTION 510 PROCESS

3. The primary resource available to regulatory authorities for evaluating permit applications under section 510(c) is OSM's Applicant/Violator System (AVS). The AVS is a system of computerized databases and software designed to search for links between permit applicants and outstanding violations by comparing information on the owners and controllers of applicants to information on the owners and controllers of entities with outstanding violations. During the permitting process, regulatory authorities query the AVS soon after receiving an application, and again just before issuing a permit. When queried, the AVS makes a recommendation to issue, deny, or condition a permit based on whether the AVS discovers an ownership or control link between the applicant and an outstanding violation.

4. OSM determines the existence of an ownership and control link by using the standards set forth in the definition of "owned or controlled" and "owns or controls" found in the regulations at 30 C.F.R. section 773.5, and by using the compliance review criteria set forth in 30 C.F.R. section 773.15(b) (1). These regulations are presently the subject of judicial review in *National Wildlife*

Federation v. Lujan, No. 88-3117 (and other consolidated dockets) (D.D.C.).

5. The ownership and control information in the AVS comes primarily from two sources – information submitted in applications for surface mining permits pursuant to section 507 of SMCRA, 30 U.S.C. section 1257, and equivalent State requirements; and additional ownership and control information developed through research conducted by the AVSO's Lexington, Kentucky, office. At present, the violations in the AVS consist of States' reports of bond forfeitures, and OSM's reports of unabated Federal performance standard violations, unpaid Federal civil penalties, and unpaid Abandoned Mine Land (AML) fees. Future improvements will expand the data in the AVS to include unabated State performance standard violations and unpaid State civil penalties, as reported by the State regulatory authorities.

6. The section 510(c) review process is in most States a cooperative Federal-State effort to comply with the congressional mandate of 30 U.S.C. section 1260(c) and to promote compliance with both State and Federal surface mining regulatory programs. The AVS is a tool used by OSM and the States in the section 510(c) review process, but that process includes more than use of the AVS. The AVSO manually verifies links identified by the AVS and reports the results to the regulatory authority, conducts research to improve the quality of data in the AVS, and searches other databases which are not part of the AVS. The AVSO also provides communications links, instructions, and training to State regulatory authorities which enable the States to perform their responsibilities

under section 510(c) and corresponding provisions of State law.

7. States are not required to follow the AVS or AVSO recommendations; but under their respective memorandums of understanding with OSM, the States are required to consider any information they receive from the AVS or AVSO before issuing a permit. In addition to querying the AVS, the States check their own databases for information on applicants, violators, and owners or controllers, and they research files kept by other agencies of the State, such as State corporation commission records.

8. The section 510(c) process also includes procedures by which OSM and the States solicit and respond to materials submitted by persons or entities to rebut the existence of ownership or control links to outstanding violations.

B. ACCESS TO INFORMATION, AND OPPORTUNITIES TO AMEND ADVERSE INFORMATION, BEFORE THE INFORMATION IS USED TO BLOCK PERMITS: THE 30-DAY LETTER PROCESS AND THE ORGANIZATIONAL FAMILY TREE REPORT

9. When the ownership and control research conducted by the AVSO's Lexington office identifies a link to an unabated violation, the AVSO sends a letter to every newly identified individual and entity, notifying such person or entity that a possible link has been identified.

The letter provides the recipient 30 days to submit materials that may correct the violation information or rebut an ownership or control link to the outstanding violation.

10. A person or entity linked to an outstanding violation may wish to contest the status of the violation, the validity of the violation, or the ownership or control link to the violation. The violations may have been cited by either OSM or State regulatory authorities.

11. The "status" of a violation includes whether such violation has been corrected, is in the process of being corrected, or is the subject of a good-faith appeal. If all violations have been corrected, the applicant may receive an unconditional permit. If all violations are in the process of being corrected, or are the subject of a good-faith appeal, the applicant may receive a conditional permit, pursuant to 30 C.F.R. § 773.15(b)(1)(i)-(ii),(2). The AVSO reviews the status of Federal violations as part of the section 510(c) review process.

12. The "validity" of a violation refers to whether a violation cited by a regulatory agency existed at all or was the responsibility of the party cited. The AVSO does not review the validity of Federal or State violations. The procedures for review of violations cited and civil penalties assessed by OSM are set forth in 30 C.F.R. sections 843.15 -.16 and 845.18 -.19, and in 43 C.F.R. sections 4.1100 -.1187 and 4.1260 -.1276, with judicial review in the Federal courts available pursuant to 30 U.S.C. section 1276. The validity of AML fee assessment may be reviewed in a collection action brought by the United States pursuant to 30 U.S.C. section 1232(e), or in a suit for declaratory or injunctive relief brought against the

United States pursuant to 28 U.S.C. sections 1331 and 2201. The procedures for review of State violations and civil penalties are as set forth in the States' regulatory programs, but they are comparable to those available for the review of Federal violations and civil penalties.

13. Ownership or control links are determined and reviewed pursuant to the regulations cited in paragraph 4, above.

14. If the material submitted in response to the "30-day letter" described in paragraph 9, above, is unpersuasive, the AVSO's Lexington office will respond in writing, explaining why the AVSO still believes that the person or entity is linked to an outstanding violation, providing copies of all documents relied upon by the AVSO in reaching that determination, and suggesting the types of documentation that would show that no such link exists. The person or entity then has an additional ten (10) working days to respond with information rebutting the link to the outstanding violation.

15. If a response to either the 30-day letter or the 10-day letter rebuts the purported link, the link will not be used to recommend denial of a permit. If a person or entity fails to respond to either the 30-day letter or the 10-day letter described in paragraphs 9 and 14 above, the AVSO will use the information in AVS to recommend denial of any pending or future applications involving the person or entity. If a person or entity responds to the 10-day letter, but does not successfully rebut the link, the Director of OSM issues OSM's final decision notifying the respondent that a link has been created in AVS, as of the

date of the Director's decision, and describing the process by which the respondent may appeal the decision.

16. Two different pathways of administrative review of an adverse decision of the Director of OSM are available within the Department of Interior – one for individuals, pursuant to the Privacy Act, and another for corporations and other organizations, which are not covered by the Privacy Act. An individual may appeal an adverse decision from the Director of OSM to the Department of Interior's Assistant Secretary-Policy, Management and Budget (formerly known as the Assistant Secretary-Policy, Budget and Administration) as provided in 43 C.F.R. section 2.74. The Assistant Secretary-Policy, Management and Budget may reverse the Director's decision in whole or in part and direct him to amend information in the AVS databases, as provided in 43 C.F.R. section 2.75(c)(3). If the Assistant Secretary-Policy, Management and Budget upholds the Director's decision in whole or in part, the Assistant Secretary's written decision will inform the petitioner of the reasons for the decision, and of the right to judicial review of the Department's decision, as required by 43 C.F.R. section 2.75(c)(2)(v).

17. Corporations and other organizations may appeal an adverse decision by the Director of OSM to the Department's Office of Hearings and Appeals, Interior Board of Land Appeals, as provided by 43 C.F.R. sections 4.1280 through 4.1286. From an adverse decision by the Interior Board of Land Appeals, judicial review is available pursuant to 5 U.S.C. sections 702 and 704.

18. Using the "30-day letter" procedures described in paragraphs 14 through 17 above, persons have in fact

provided the AVSO with information which caused the AVSO to amend information in the AVS before it was used to block permits, thus assuring both fairness and accuracy of the AVS.

19. Separately from the 30-day letter process, the AVSO sends applicants for whom it recommends granting a permit a list of the known ownership and control relationships involving the applicant. The applicant may then advise the AVSO of any erroneous information in its "organizational family tree." Such applicants thus have an opportunity to avoid having inaccurate ownership or control information cause denial of future permits, or issuance of "30-day letters" described in paragraph 9, above, based on subsequently obtained data on unabated violations.

C. OTHER OPPORTUNITIES FOR ACCESS TO INFORMATION IN THE AVS, AND FOR AMENDMENT OF ADVERSE INFORMATION IN AVS PRIOR TO PERMIT APPLICATION

20. Independently of the 30-day letter process described in paragraphs 9 through 17, above, individuals may obtain access to information relating to them in the AVS databases by submitting a request under the Privacy Act as specified in 43 C.F.R. section 2.63. The AVSO provides the information pursuant to 43 C.F.R. section 2.64. Privacy Act requests for AVS information, however, have been rare.

21. In addition to the Privacy Act procedures outlined in paragraph 20, above, individuals and corporations or other organizations may seek access to

information in the AVS databases by submitting a request under the Freedom of Information Act, as specified in 43 C.F.R. section 2.14. The AVSO provides the requested information as set forth in 43 C.F.R. sections 2.13 through 2.16.

22. An individual or entity may at any time seek to amend information contained in the AVS databases before a permit application is filed. Such requests by individuals are to be submitted to OSM pursuant to the procedures in 43 C.F.R. section 2.71. No particular format is required for requests from corporations and other organizations.

23. If an individual or an entity submits information that rebuts a presumed ownership or control link, or that persuades the AVSO that the link was based on erroneous information, the link will be removed from the AVS. On the other hand, if OSM remains convinced that an ownership and control link is valid, the Director will issue a written decision and the link will remain on the AVS.

24. Administrative and judicial review of an adverse decision by the Director of OSM are available as previously described in paragraphs 16 and 17.

D. REVIEW OF PERMIT-BLOCKING INFORMATION IN THE APPLICATION REVIEW PROCESS AND ON APPEAL OF DENIAL OF A PERMIT

25. Even if an individual or entity has not taken advantage of the opportunities to contest the accuracy of the information in the AVS prior to filing an application,

an applicant has opportunities for administrative review during the application review process. The applicable State regulatory authority makes the permitting decisions in the 23 States with approved regulatory programs. OSM is the regulatory authority in the other coal-producing States.

26. If the regulatory authority accepts an AVSO recommendation to deny an application, the regulatory authority notifies the applicant and refers the applicant to the State or Federal agency with jurisdiction over the violation linked to the applicant. The permit applicant may submit to the regulatory authority a response to an adverse recommendation from the AVSO, or to any other information available to the regulatory authority which could block a permit. Such a response may attempt to refute the facts or, if the link is based on the regulatory program equivalent to 30 C.F.R. section 773.5(b), rebut the presumptions underlying the ownership or control link. The regulatory authority must issue a decision on the permit application within a reasonable time, pursuant to 30 U.S.C. section 1264(b) or equivalent State law.

27. A permit applicant may challenge any basis for a denial of a surface mining permit, including the status or validity of an outstanding violation or the ownership or control link to an unabated violation. SMCRA, at 30 U.S.C. section 1264, and its implementing regulations establish procedures for review of decisions on permit applications.

28. When OSM is the regulatory authority, a decision denying an application for a surface coal mining permit may be appealed to the Department's Office of

Hearings and Appeals, Hearings Division, pursuant to 43 C.F.R. sections 4.1360 through 4.1388. An adverse decision of the Hearings Division may be appealed to the Interior Board of Land Appeals pursuant to 43 C.F.R. sections 4.1369, 4.1378, and 4.1388. A decision by the Interior Board of Land Appeals is subject to judicial review pursuant to 30 U.S.C. section 1276. Alternatively, if the Hearings Division upholds OSM's decision to deny a new surface mining permit, the applicant may bypass the Interior Board of Land Appeals and seek judicial review of the Hearing Division's decision pursuant to 30 U.S.C. section 1276(a)(2) and 43 C.F.R. section 4.1369(a).

29. State regulatory programs also contain administrative and judicial review procedures for permit application decisions, pursuant to State laws in conformity with 30 C.F.R. part 775.

30. Challenges to a State regulatory authority's determination of an ownership or control relationship or the status or validity of a violation are reviewed in the appropriate State forum. A State's review procedures govern that State's review of the status and validity of the violations it cited, and the ownership or control links to permit applications filed with it or to violations which it cited. AVSO occasionally receives requests from States to amend information on State violations. In such instances, AVSO presumes that the State has appropriate documentation to support the requested amendment, and amends the information in the AVS databases.

E. PITTSTON RECEIVED 30-DAY LETTERS AND ENTERED INTO NEGOTIATIONS WITH OSM, BUT FILED THE PRESENT CIVIL ACTION INSTEAD OF EXHAUSTING ITS ADMINISTRATIVE REMEDIES

31. As early as November 5, 1990, officials of plaintiff Clinchfield Coal Company (Clinchfield), which is owned and controlled by plaintiff Pittston Coal Company (Pittston), were informed that AVSO's investigations into the ownership and control of certain contract mining operators could result in issuance of 30-day letters to Clinchfield. Several contacts between Clinchfield and OSM occurred in the following weeks.

32. Among those contacts was a meeting on November 21, 1990, between the AVSO's Lexington office and an official of Clinchfield. That meeting concerned the ownership and control links of Clinchfield and Pittston to contract mining operators responsible for unabated violations. That meeting also addressed the possibility of opening negotiations to resolve pertinent issues in lieu of OSM's sending 30-day letters to Clinchfield.

33. Negotiations between OSM and Pittston and Clinchfield occurred in several telephone conversations and a few meetings during the next three weeks. The parties, though, could not come to an agreement that would obviate the need for commencing the 30-day letter process.

34. On December 14, 1990, after negotiations with Pittston had broken down, the AVSO's Lexington office sent a 30-day letter to Coal Energy, Inc., Fadco, Inc., and to the individuals and entities, including Clinchfield,

found to be owners or controllers of Coal Energy, Inc., or Fadco, Inc. File copies of the 30-day letters sent to Coal Energy, Inc., Fadco, Inc., and their owners and controllers, including Clinchfield, are attached to this affidavit as Appendixes A and B, respectively.

35. On December 17, 1990, AVSO's Lexington office sent 30-day letters to Elkins Energy Corporation, and Golden Chip Coal Co., Inc., and to the individuals and entities, including Clinchfield, found to be owners or controllers of Elkins Energy Corporation, or Golden Chip Coal Co., Inc. File copies of those 30-day letters are attached to this affidavit as Appendixes C and D.

36. In addition, on December 20, 1990, I sent Pittston the attached letter (Exhibit 1 to plaintiffs' complaint, Appendix E to this affidavit) to assure that Pittston was aware of the January 18, 1991, deadline for rebutting the ownership or control links, or contesting the status or validity of the violations of the contract miners. My December 20 letter also invited Pittston to enter into comprehensive settlement negotiations with respect to all its contract miners.

37. My December 20 letter mistakenly refers to Delight Coal Corporation, for which a 30-day letter has not been issued to Clinchfield or Pittston. Although OSM is willing to discuss Delight Coal Corporation with Pittston, OSM would not block Pittston based on unabated violations of Delight Coal until OSM sends a 30-day letter to Pittston or Clinchfield as owners or controllers of Delight Coal, and then follows the process previously described in this affidavit. Instead of Delight Coal Corporation, my December 20 letter should have included a

reference to Coal Energy Company, Inc. The inadvertent substitution of Delight Coal Corporation for Coal Energy Company does not change the basic point of my December 20 letter, which was an invitation to Pittston to step out of the 30-day letter process and resolve all its potential blocks based on contractors in non-adversarial negotiations.

38. Pittston responded to the 30-day letters and my December 20 letter by entering into negotiations with OSM. Formal negotiating sessions were held on December 27, 1990, and January 9, 1991. On January 14, 1991, OSM agreed to Pittston's request that the time for further negotiations be extended to January 25, 1991. On January 18, 1991, though, counsel for Pittston told counsel for OSM that the negotiations were over and that Pittston had commenced the present civil action. At no time did Pittston or Clinchfield invoke any of the procedures available to them for challenging the ownership or control or violation information that formed the basis for OSM's 30-day letters.

CONCLUSION

39. The administrative remedies described in the preceding paragraphs 4 through 30 are available to all persons and entities wishing to review, amend, or challenge determinations made under 30 U.S.C. section 1260(c) and applicable regulations. Those administrative procedures, with opportunities for judicial review, were

available to Pittston, but Pittston commenced the present civil action before exhausting its administrative remedies.

/s/ Annetta L. Cheek
ANNETTA L. CHEEK

Subscribed and sworn before me by Annetta L. Cheek on this 30 day of September, 1991.

/s/ Elizabeth J Sherwood
Notary Public

My commission expires: My Commission Expires March 31, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE PITTSTON COMPANY, et al, Plaintiffs,	)	
v.	)	Civil Action No. 91-0006-A
MANUEL LUJAN, JR., Secretary of the Interior, et al, Defendants.	)	

AFFIDAVIT OF JOHN BRYAN

1. I am John Bryan of Russell County, Virginia. I am Vice President for Environmental Affairs for Pittston Coal Management Company. One of the companies I serve is Clinchfield Coal Company. I am familiar with Clinchfield's policies concerning compliance with federal and state surface mining laws and I have participated in the resolution of many enforcement actions under these laws against Pittston Coal Company (PCC) and its subsidiaries, including Clinchfield. I have been with the PCC companies over 20 years. I have investigated the facts and participated in the negotiations with OSM involving this dispute.

2. For at least 40 years many coal companies, including Clinchfield, have contracted out production of some of their coal. At various times during the late 1970's through the early 1980's, Clinchfield contracted with Golden Chip Coal Company, Delight Coal Company, Fadco, and Elkins Energy Corporation to mine coal for Clinchfield. Clinchfield had many other contractors on its

property. The named contractors all had their own mining permits throughout the time they mined for Clinchfield. All are now out of business; some are bankrupt.

3. It was a new development when in 1988 OSM started saying it would require companies to pay their contractors' penalties for past violations. Before 1988 the industry did not think that companies would be made liable for such violations.

4. Clinchfield was never made a party to the proceedings against any of the four contractors involved here and was never given the opportunity to contest the violations, the amount of the fines and penalties, or to correct any violations so as to avoid the penalties.

5. Clinchfield and other PCC companies have received numerous NOV's and some CO's over the years on their own permits. PCC and its subsidiary companies carefully investigate all NOV's and CO's. Where a violation has occurred, they promptly correct it to avoid harm to the environment, preventing the accumulation of large penalties.

6. If Clinchfield had been given notice of the charges in this case, it could have demanded that the contractors remedy the violations and required that they indemnify Clinchfield for any penalties incurred. This opportunity is now lost because the four contractors are all bankrupt or out of business.

7. If blocking should occur, operations in Virginia, West Virginia and Kentucky would be affected. Permits for new mines would be delayed, as would renewals for

existing mines. Such delays would cause significant damage to both the companies and its employees.

8. In her affidavit, Ms. Cheek indicated that Clinchfield would be given a chance to oppose blocking within sixty days *after* it is imposed. However, here are some of the effects that blocking would have in the meantime:

> a. Eight new permits which are now expected to be issued in January or February, 1992 would be withheld. Two of these permits are to replace mines that are being worked out. Blocking would immediately idle the miners and equipment that would otherwise go to work at the new mines on the pending permits.
>
> b. An additional new permit request is under active review by the West Virginia authorities. If it is not approved by June 1992, it may cause the closure of a preparation plant in 1993.
>
> c. Seventeen permit revisions, modifications, reviews, renewals or transfers now pending are expected to be approved in the first quarter of 1992. Of those, five are scheduled for action during the first two months of 1992. The other twelve will probably be delayed by blocking.
>
> d. Nine permit applications, revisions, amendments and transfer applications will be submitted in the first quarter of 1992. I believe they will be delayed if blocking is in effect when they are submitted.

9. As can be seen, a sixty day block would have serious economic consequences for the companies and

their employees. The consequences are such that plaintiffs cannot afford to contest the issues if, in the meantime, they are blocked from obtaining permits.

10. Clinchfield is being made to pay for someone else's violations long after they have been imposed and without any practical opportunity to defend itself.

/s/ John Bryan
John Bryan

STATE OF VIRGINIA

COUNTY OF WASHINGTON

Subscribed and sworn to before me this 24th day of December, 1991, by John Bryan.

/s/ Phyllis Fields
Notary Public

By commission expires: June 30, 1993.

TRANSCRIPT OF HEARING ON
February 10, 1992

* * *

[p. 7] JAMES CAMPBELL, PLAINTIFFS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. HODGES:

* * *

[p. 11] Q Mr. Campbell, just briefly, what would happen to your company if you got blocked between the time you could have this hearing that OSM is talking about, if they blocked you first and then gave you a hearing later on?

A It would do huge damage to the company.

* * *

Q Mr. Campbell, generally tell the Court what would occur [p. 12] within your companies, or within the Pittston companies in three states if they were blocked for a period of time, and then were given a hearing 30 or 60 days after that?

A It would grind the permitting process to a halt. In West Virginia, and that's the only place I can speak of, they would quit reviewing permits. That would extend the time that it would require us to get permits. It would put people out of work, and it would have a severe financial impact on Pittston.

Q Just at any given time, just in the state of West Virginia, alone, does your, do your companies have a number of different permitting procedures going on?

A We probably have 30 some going right now.

* * *

Supreme Court, U.S.
FILED
FEB 5 1996
CLERK

No. 95-1089

In the

Supreme Court of the United States

October Term, 1995

THE PITTSTON COMPANY and
CLINCHFIELD COAL COMPANY,
Petitioners,

v.

BRUCE BABBITT, Secretary, United States
Department of the Interior,

COMMONWEALTH OF VIRGINIA, Department
of Mines, Minerals & Energy, Division
of Mined Land Reclamation,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF OF THE NATIONAL MINING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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21 pp

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BRIEF OF THE NATIONAL MINING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Amicus, National Mining Association ("NMA"), is a trade association whose 365 members include mining companies, mining equipment manufacturers and suppliers, and related businesses that serve the mining industry. NMA's central purpose is to represent the interests of its members in important public policy issues affecting the development and use of mineral resources.

NMA's coal mining members produce most of the nation's coal. As such, Amicus has a special interest in the interpretation of federal laws which regulate the mining of coal, and in assuring that section 526(a)(1) of the Surface Mining Control and Reclamation Act ("SMCRA" or "Surface Mine Act"), 30 U.S.C. § 1276(a)(1),[2] is correctly interpreted to ensure that its members are not wrongfully

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[1] Pursuant to Supreme Court Rule 37.2, Amicus has filed with the Court documents reflecting that the counsel for all parties to this proceeding have consented to the filing of this Brief.

[2] Section 1276(a)(1) provides in pertinent part:

> Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 [30 U.S.C. §§ 1251, 1265, 1266, and 1273] shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located.

precluded or constrained from obtaining judicial relief in a convenient forum. Petitioners, The Pittston Company and its subsidiary Clinchfield Coal Company (together "Pittston"), are not members of NMA. However, interpretation of the judicial review provisions enumerated in section 1276(a)(1), has been the source of enduring dispute and uncertainty, and the issue presented in Petitioners' Petition for a Writ of Certiorari ("Petition") is significant to the coal industry.

This Court was first asked to review the subject matter jurisdiction issue presented in the Petition fourteen years ago. *Watt v. Holmes Limestone Co., cert. denied*, 456 U.S. 995 (1982).[3] Over the objection of two justices the Court declined to accept certiorari. Justice White, writing for the dissenters, correctly predicted that failure to address the issue could result in "substantial disruption both to the coal mining industry and to the agencies charged with administering the Surface Mining Act." *Id.* at 997.

There was no conflict among the circuits at the time this Court declined review of *Holmes Limestone*. This is no

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[3] In *Holmes Limestone*, the Sixth Circuit held that section 1276(a)(1) authorized concurrent jurisdiction in the federal courts to hear challenges to national rules promulgated by the Secretary of the Interior, rejecting the Secretary's assertion that affected parties were required to bring such challenges exclusively in the United States District Court for the District of Columbia. *Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 733 (6th Cir. 1981).

longer the situation.[4] Although this Court did grant certiorari in a subsequent case interpreting section 1276(a)(1) in a manner conflicting with *Holmes Limestone*, that case settled, and certiorari was dismissed. *See Virginia ex rel. Virginia Dep't of Conservation & Economic Dev. v. Watt*, 741 F.2d 37 (4th Cir.), *cert. granted*, 469 U.S. 979 (1984), *cert. dismissed*, 469 U.S. 1198 (1985).

The disparate impact arising from the conflicting interpretations the circuits have given section 1276(a)(1) is substantial, and the prospect of unnecessary threshold litigation over the question of which is the appropriate court persists. For example, an operator mining coal in Ohio or Kentucky may file a direct facial challenge to a rule promulgated by the Secretary of the Interior in local federal district court. In contrast, as demonstrated by the case now before the Court, an operator in neighboring Virginia or West Virginia may stipulate that the facial validity of a rule is not being contested, yet cannot establish jurisdiction in local federal district court to adjudicate whether the application of the rule violates the operator's due process rights.

Importantly, even if the Court should reject the interpretation of section 1276(a)(1) set forth in *Holmes*

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[4] The Petition sets forth the status of the various circuit courts' interpretation of section 1276(a)(1). Petition, 8-9.

Limestone, the factual situation presented in the Petition requires the Court to decide whether the jurisdiction limiting effect of section 1276(a)(1) extends to procedural due process challenges, or other requests for judicial review in which the facial validity of a national rule is not under attack.[5] Granting certiorari in this case would promote certainty and uniformity in the jurisdictional power of the federal courts.

SUMMARY OF ARGUMENT

Congress may invest a particular federal court with exclusive jurisdiction to hear challenges to agency action, but statutory provisions which purport to restrict the availability of judicial review should be read narrowly, not broadly. Congress has demonstrated in numerous statutes a sensitivity to the need to speak clearly when curtailing the venue normally available to a litigant. The absence of any words in section 1276(a)(1) of the Surface Mine Act indicating an intent to restrict venue where a federal court is asked to review actions by the Secretary of Interior promulgating national rules is especially significant, because words demonstrating a clear intent to provide for exclusive jurisdiction are used elsewhere in the Act, including section 1276(a)(1) itself.

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[5] Jurisdictional confusion under section 1276(a)(1) persists even where the issue is one of application of a rule versus the validity of a rule. *See Coteau Properties Co. v. Department of the Interior*, 53 F.3d 1466, 1471 n.6 (8th Cir. 1995).

Even if section 1276(a)(1) may be read to vest exclusive jurisdiction in the District Court for the District of Columbia Circuit to hear challenges to national rules promulgated by the Secretary, the language of section 1276(a)(1) and due process concerns support the conclusion that other federal courts retain jurisdiction to adjudicate cases in which the facial validity of a rule is not under attack.

ARGUMENT

A. Provisions In Federal Statutes Which Purport To Restrict The Availability Of Judicial Review Should Be Narrowly Construed.

30 U.S.C. § 1276(a)(1) states, in pertinent part, that "[a]ny action by the Secretary promulgating national rules or regulations . . . shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." Petitioner has set forth the relevant legislative history of the Surface Mine Act which bears on why the absence of any word of limitation such as "only" or "exclusive" is significant. Petition, 12-13. Amicus will not revisit the legislative history of the Act. However, the general principle that access to judicial review should not be restricted absent a clear Congressional directive merits emphasis.

The Congressional power to ordain and establish inferior courts "includes the power of investing them with jurisdiction either limited, concurrent, or exclusive and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quotations omitted). Indeed, the Administrative Conference of the United States, which was established by the Legislature to study and make recommendations concerning the adequacy and fairness of administrative procedure,[6] has recognized the principle that jurisdictional provisions "should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court." 41 Fed. Reg. 56767 (1976).

Congress has demonstrated that it knows how to restrict venue for challenging the validity of a regulation. For instance, the Emergency Price Control Act of 1942[7]

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[6] *See* 5 U.S.C. § 574(1).

[7] 50 U.S.C. § 204(d), in pertinent part, provided:

> The Emergency Court of Appeals, and the Supreme Court ... *shall have exclusive jurisdiction* to determine the validity of any regulation or order issued under section 2 .... Except as provided in this section, *no court, Federal, State, or Territorial, shall have jurisdiction or power* to consider the validity of any such regulation, order, or price schedule ....

Lockerty, 319 U.S. at 186-87 (emphasis added).

vested in the Emergency Court of Appeals and this Court *exclusive jurisdiction* to pass on the validity of commodity price control regulations promulgated by the Price Administrator. Thirty years later in conjunction with construing the breadth of judicial review provisions in the Clean Air Act, Chief Justice (then Associate Justice) Rehnquist noted that "[t]he broad language of [the Emergency Price Control Act] gave *clear evidence of congressional intent* that any actions taken by the Price Administrator under the purported authority of the designated sections of the Act should be challenged *only* in the Emergency Court of Appeals." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 279 (1978) (emphasis added).

In a number of environmental protection statutes Congress has employed plain language evidencing its intent to confer to a single tribunal exclusive venue to review challenges to the validity of agency regulations, including regulations establishing national performance standards. Thus, under Section 7006(a)(1) of the Resource Conservation and Recovery Act -- the 1976 statute regulating the storage, treatment and disposal of hazardous waste -- a petition for review of the EPA's action in promulgating "any regulation, or requirement under this chapter ... may be filed *only* in the United States Court of Appeals for the District of Columbia Circuit...." 42 U.S.C. § 6976(a)(1) (emphasis added).

Section 307(b) of the Clean Air Amendments of 1970 provides that a petition for review of the Administrator's action in promulgating certain national emissions standards "may be filed *only* in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1) (emphasis added). The very next sentence provides that a petition for review of the Administrator's action in approving or promulgating any state implementation plan "may be filed *only* in the United States Court of Appeals for the appropriate circuit." *Id.* (emphasis added). Similarly,

Section 16(a) of the Noise Control Act of 1972 also contains a clear limitation on the venue for reviewing certain agency actions. It provides that a petition for review of the Administrator's action in promulgating certain national emission standards "may be filed *only* in the United States Court of Appeals for the District of Columbia Circuit." 42 U.S.C. § 4915(a) (emphasis added).

As these environmental statutes demonstrate, section 1276(a)(1) of the Surface Mining Act of 1977 was not drafted in a vacuum. Rather, this provision was enacted against the backdrop of a series of environmental protection statutes which used consistent and clear exclusivity language. As these statutes confirm, Congress was accustomed to employing plain exclusivity language when it intended to restrict venue to review agency action.

Numerous provisions in the Surface Mining Act demonstrate that Congress was attentive to the need to draw clear jurisdictional lines. For example, in section 1253(a) Congress expressly conferred *exclusive* jurisdiction over the regulation of surface coal mining and reclamation operations to states promulgating a state regulatory program approved by the Department of the Interior. *See also* 30 U.S.C. § 1254(a) (vesting the Secretary with *exclusive* jurisdiction where a federal plan is promulgated). Sections 1270(c) and (f) provide that challenges brought by citizens to compel compliance with the Surface Mining Act or for damages may be brought "*only* in the judicial district in which the surface coal mining operation complained of is located." (emphasis added).

Thus, it is significant that the relevant sentence in section 1276(a)(1) which provides that "[a]ny action by the Secretary promulgating national rules ... shall be subject to judicial review in the United States District Court for the District of Columbia Circuit" is immediately followed by a sentence which states that any other action constituting rulemaking by the Secretary shall be subject to judicial review "*only* by the United States District Court for the District in which the surface mining operation is located." (emphasis added). Where specific language is included in one section of a statute but omitted in another related section of the same statute, it is generally presumed that disparate inclusion and exclusion was done intentionally and

purposefully. *Russello v. United States*, 464 U.S. 16, 23 (1983). Moreover, as this Court noted in *Russello*, where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment -- as happened with section 1276(a)(1)[8] -- "it may be presumed that the limitation was not intended." *Id.* at 23-24. *See also Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1429 (D.C. Cir. 1984) (construing the scope of venue restrictions for citizens' suits authorized under section 1270(c) of the Surface Mining Act) ("Although there is no explanation for the adoption of the broader provision, we may not assume that Congress took this action 'for no reason at all'").

The rule that words employed in a statute should not be discarded as being mere surplusage or being meaningless applies with particular force where such terms are included in some sections and excluded in other sections of the same act. *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992). Where Congress knows how to say something but chooses not to, its silence is controlling. *In re Haas*, 48 F.3d 1153 (11th Cir. 1995) (compiling cases).

The absence of plain language in section 1276(a)(1) restricting jurisdiction to the District Court for the District of Columbia, coupled with a legislative history which does not

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[8] The legislative history of section 1276(a)(1) is summarized in the Petition, 12-13.

reveal clear Congressional intent to restrict jurisdiction, requires a finding of concurrent jurisdiction. Accordingly, this Court should affirm the interpretation of section 1276(a)(1) set forth in *Holmes Limestone*, and reject limitations on judicial review which other circuits have read into section 1276(a)(1).

B. Assuming Section 1276(a)(1) Limits Review Of Any Action By The Secretary Promulgating National Rules To The District Of Columbia, It Does Not Divest Other Federal Courts Of Jurisdiction To Hear Cases That Do Not Challenge The Facial Validity Of A National Rule.

Pittston has not challenged the facial validity of any rule promulgated by the Secretary. Petition, 15. Even if Congress intended that challenges to the Secretary's rules be brought only in the United States District Court for the District Of Columbia, it does not follow that the preclusive effect of section 1276(a)(1) is so complete that any challenge to administrative action taken in accordance with the regulations constitutes an attack on the regulations which can be heard only in that forum. *See Virginia ex rel.*, 741 F. 2d at 40.

Section 1276(a)(1) provides, in pertinent part, that any action by the Secretary "promulgating national rules or

regulations *including standards pursuant to sections 1251, 1265, 1266, and 1273* shall be subject to judicial review in the United States District Court for the District of Columbia Circuit." Each of these enumerated sections pertains to national performance standards.[9] No enumerated section pertains to enforcement provisions (section 1271), or rules for permit approval or denial (section 1260). Since the enumerated sections focus on performance standards, rules of statutory construction caution against an expansive reading of section 1276(a)(1). "[W]here it clearly appears that the lawmakers were thinking of a particular class of ... objects their words of a general description may not have been intended to embrace any other than those within the class...." *Reiche v. Smythe*, 80 U.S. 162 (1872). *See generally, 2A Singer, Sutherland Statutes and Statutory Construction* § 47.16 (5th ed. 1991).

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[9] Section 1251 pertains to "Environmental Protection Standards" during the interim regulatory program. Section 1265 addresses "Environmental Protection Performance Standards" during the permanent regulatory program. Section 1266, "Surface Effect of Underground Coal Mining Operations", sets forth the special environmental performance standards applicable to underground coal mining. Section 1273 pertains to "Federal Lands", and sets forth the requirements for implementing a surface mining program covering federal lands.

Although the referenced sections may not on their face limit the categories of national rules subject to review in the United States District Court for the District of Columbia Circuit, they are relevant when considering the scope of any preclusive effect to be given to section 1276(a)(1). Assuming *arguendo* that Congress intended that judicial review of actions by the Secretary promulgating national rules be limited to the United States District Court for the District of Columbia, the enumerated sections show that the legislative concern was to maintain a forum for contesting national environmental performance standards. These enumerated sections provide no support for reading section 1276(a)(1) in a manner that divests all other federal courts of jurisdiction to hear a case which does not contest the validity of a national rule, even if the outcome might preclude application of the rule in a particular case.

Case law also supports a narrow construction of the exclusive effect to be given to a provision which purports to limit the availability of judicial review. In *Chrysler Corp., v. E.P.A.*, 600 F.2d 904 (D.C. Cir. 1979), the District of Columbia Circuit was required to consider the scope of section 16(a) in the Noise Control Act of 1972, 42 U.S.C. § 4915(a), which designated the United States Court of Appeals for the District of Columbia Circuit as the exclusive venue for hearing certain challenges. The Court held that it lacked jurisdiction to review the facial validity of enforcement regulations promulgated pursuant to the Act because the

enforcement regulations did not rest on any of the sections designated for exclusive review by the Court. The Court deemed the legislative history of the parallel provisions of the Clean Air Amendments of 1970 instructive, noting that the Congressional purpose for creating a single channel for questioning the validity of regulations was "much more easily fitted to standards and testing [procedures necessary to assure compliance with such standards] than to an enforcement scheme." *Chrysler*, 600 F.2d at 912. *See also Adamo*, 434 U.S. at 284.

Restricting the scope of any preclusive effect which section 1276(a)(1) may impose on obtaining judicial review also ameliorates due process concerns. In his dissent in *Yakus v. United States*[10], Justice Rutledge noted the due process concerns raised by legislation which imposes severe limits on judicial review of regulatory action. His concerns underlie the "nagging ... substantial due process question" identified in *Chrysler*, 600 F.2d at 913, and presented by Petitioners' situation. Faced with a permit block, a mining company is confronted with an unpalatable choice -- risk

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[10] Justice Rutledge indicated that the Emergency Control Act:

> provided a short cut proceeding trimmed almost to the bone of due process, even for wholly civil purposes, ... pared down even further by a short statute of limitations.

321 U.S. 414, 474 (1944) (J. Rutledge, dissenting).

substantial impairment of its business[11] or undertake and complete reclamation work purportedly prompted by third-party misconduct and pay the government an amount equal to outstanding fines and interest purportedly owed by third-party operators, without being afforded an opportunity to test the bona fides of the underlying violations, fines and interest calculations.

Where the question presented for adjudication goes to constitutional issues of the adequacy of notice and hearing, and where the court is not being asked to rule on the merits of any national rule, it is error for the court to conclude that section 1276(a)(1) divests it of jurisdiction to hear the case. In the absence of clear language which requires that section 1276(a)(1) be given such broad preclusive effect, Petitioners can establish jurisdiction to adjudicate their due process rights in a local forum. It is unnecessary to foreclose Petitioners' right to raise a due process challenge in this case because section 1276(a)(1) does not require such a result.[12]

---

[11] Like Petitioners, most coal operators are constantly in the process of renewing or revising their permits or seeking new permits for additional operation. *See Coteau*, 53 F.3d at 1489. Delay or denial of these permits could cause serious difficulties in meeting contractual obligations, and the consequences are often irreparable. *Id.*

[12] *Adamo*, 434 U.S. at 290 (J. Stewart, J. Brennan and J. Blackmun dissenting) ("Because the petitioner has not raised any constitutional challenge in this case, there is no occasion to consider what

(continued...)

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision below should be reversed and remanded for further proceedings.

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[12](...continued)
limits, if any, the Due Process Clause of the Fifth Amendment imposes on the power of Congress to qualify or foreclose judicial review of agency action"); *Harrison v. PPG Industries, Inc.*, 446 U.S. 592, 594 (1980) (J. Powell, concurring) ("I continue to have reservations about the constitutionality of the notice and review preclusion provisions of [the Clean Air Act]").

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No. 95-1089

In the Supreme Court of the United States

OCTOBER TERM, 1995

THE PITTSTON COMPANY, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the United States District Court for the District of Columbia has exclusive jurisdiction over challenges to nationwide regulations issued under the Surface Mining Control and Reclamation Act of 1977.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 66 F.3d 714. The opinion of the district court (Pet. App. 4a-27a) is reported at 798 F. Supp. 344.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1995. A petition for rehearing was denied on December 11, 1995. Pet. App. 42a-43a. The petition for a writ of certiorari was filed on January 5, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, requires businesses engaged in mining coal to obtain a permit before mining. 30 U.S.C. 1256(a). The SMCRA is administered by the Secretary of the Interior through the Office of Surface Mining Reclamation and Enforcement (OSM). Pet. App. 5a. Many coal-producing States, including respondent Commonwealth of Virginia, have authority to issue permits subject to OSM oversight. *Id.* at 10a. n.3.

Under Section 510(c) of the Act, when "information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of [the SMCRA or other pollution control laws], the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected." 30 U.S.C. 1260(c). In 1988, the Secretary of the Interior issued nationwide regulations that define "owned or controlled." 30 C.F.R. 773.5. Under those regulations, there is a presumption of ownership or control when a person owns or controls coal to be mined by another person and has the right to receive such coal after mining. 30 C.F.R. 773.5(b)(6). A challenge to those regulations was rejected by the District Court for the District of Columbia. *National Wildlife Fed'n* v. *Babbitt*, Nos. 88-3117, 88-3464 & 88-3470 (Aug. 31, 1995). An appeal of that judgment is pending in the United States Court of Appeals for the District of Columbia Circuit.

National Mining Ass'n v. *Babbitt*, No. 95-5434 (filed Dec. 28, 1995).

OSM has established a computer system that identifies whether an applicant for a permit is linked by ownership or control to a person with outstanding violations of mining laws. Pet. App. 6a. When that system identifies a link to an unabated violation, OSM will give the entity an opportunity to show that it is not linked to the violation or that the violation is being corrected or is subject to a good faith appeal. *Id.* at 7a-8a. OSM will not, however, review the validity of the underlying violation. *Id.* at 8a. If there is no response or OSM finds the response unpersuasive, it will issue a final decision recommending a denial of the permit to the regulatory authority. *Ibid.* That decision is subject to administrative and judicial review. *Id.* at 8a-9a.

Even if review of OSM's decision is not sought, the applicant may still attempt to persuade the regulatory authority that it is not linked to the violation. Once again, however, it may not challenge the validity of the underlying violation. If the regulatory authority denies the permit, the applicant may obtain administrative and judicial review of that decision, and may challenge the validity of the underlying violation. Pet. App. 10a-11a.

2. Petitioner Pittston Company, through its subsidiary Clinchfield Coal Company, is engaged in the business of mining in Virginia and other States. Pet. App. 4a-5a. Petitioner contracts with mining firms, known as contract miners, that mine the coal for petitioner. The contract miners obtain permits in their own names, but petitioner retains the right to receive the coal after mining. *Ibid.* In December 1990, OSM notified petitioner that contract miners it

controlled had outstanding violations of SMCRA. *Id.* at 11a. OSM further notified petitioner that it would be blocked from obtaining permits unless it agreed to abate the violations or demonstrated that it did not control the contract miners. *Id.* at 12a.

In response, petitioner filed suit in the United States District Court for the Western District of Virginia. Pet. App. 12a-13a. Petitioner alleged that blocking its permit applications based on violations by its contract miners would violate the Due Process Clause because petitioner was not a party to the prior actions against the contractors and did not have notice or an opportunity to contest the underlying violations. *Id.* at 13a. Petitioner sought an injunction barring OSM and the Commonwealth of Virginia from blocking its future permit applications based on the violations committed by its contract miners. *Ibid.*

The district court issued a preliminary injunction prohibiting the blocking of permits in Virginia based on the violations by the contract miners. Pet. App. 13a. The court later expanded the injunction to prohibit the blocking of permits based on any violation of any mine operator owned or controlled by petitioner in any State. *Id.* at 38a. Ultimately, however, the district court dismissed petitioner's complaint for lack of jurisdiction. *Id.* at 4a-28a. The court held that 30 U.S.C. 1276(a)(1) gives the District Court for the District of Columbia exclusive jurisdiction over challenges to nationwide regulations issued under SMCRA, and it concluded that petitioner's complaint challenged such regulations. Pet. App. at 15a-27a. The court rejected petitioner's contention that it was attacking only the agency's action in blocking permits, and not the ownership and control regulations themselves. *Id.* at 23a-24a. The court

explained that the regulations themselves required the regulatory authority to deny permits to parties linked to prior violations without examining the validity of the underlying violations. *Id.* at 24a. Any challenge to such an action was therefore "tantamount to an attack on the regulations themselves which can be brought only in the District of Columbia." *Ibid.*

The court of appeals affirmed the district court's dismissal for lack of jurisdiction, Pet. App. 1a-3a, relying on "the compelling reasoning of the district court." *Id.* at 3a.

ARGUMENT

1. a. Petitioner contends (Pet. 11-14) that federal district courts outside the District of Columbia have concurrent jurisdiction over challenges to nationwide regulations issued under SMCRA. That contention is without merit. As the Third, Fourth, Eleventh, and Federal Circuits have held, 30 U.S.C. 1276(a)(1) gives the District of Columbia district court exclusive jurisdiction over such challenges. *United States* v. *Troup*, 821 F.2d 194, 197-199 (3d Cir. 1987); *Clinchfield Coal Co.* v. *Department of Interior*, 802 F.2d 102 (4th Cir. 1986) (per curiam); *Virginia* v. *Watt*, 741 F.2d 37 (4th Cir. 1984); *Tug Valley Recovery Ctr.* v. *Watt*, 703 F.2d 796 (4th Cir. 1983); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 472-476 (11th Cir. 1984); *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1213-1215 (Fed. Cir. 1990).

The text of Section 1276(a)(1) specifically designates the District of Columbia district court as the forum for challenges to nationwide SMCRA regulations. See 30 U.S.C. 1276(a)(1) ("Any action by the Secretary promulgating national rules or

regulations [under SMCRA] * * * shall be subject to judicial review in the United States District Court for the District of Columbia Circuit."). Under established principles of statutory construction, such a specific designation shows that Congress intended for the forum to be exclusive, and "this result does not depend on the use of the word 'exclusive' in the statute providing a forum for judicial review." *Troup*, 821 F.2d at 198; see also *Save Our Cumberland Mountains, Inc.* v. *Lujan*, 963 F.2d 1541, 1550 (D.C. Cir. 1992), cert. denied, 507 U.S. 911 (1993); *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193, 1195 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984); *Aminoil U.S.A., Inc.* v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1235 (9th Cir. 1982); *City of Rochester* v. *Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979); *Getty Oil Co. (Eastern Operations), Inc.* v. *Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Gardner* v. *Alabama*, 385 F.2d 804, 810 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968); cf. *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965) (when Congress has specified a scheme of review, that scheme must be followed notwithstanding the absence of an express command of exclusiveness).

In addition, Section 1276(a)(1) states that national regulations "*shall* be subject to judicial review in the United States District Court for the District of Columbia." 30 U.S.C. 1276(a)(1) (emphasis added). As the Eleventh Circuit has explained, "[t]he word 'shall' is a mandatory, not permissive, form and indicates a congressional intent to require that judicial review of regulations having nationwide application occur in the federal district court in the District of

Columbia." *Drummond*, 735 F.2d at 473 (footnote omitted); see also *Amerikohl*, 899 F.2d at 1213; *Troup*, 821 F.2d at 198.

Finally, if Congress had not specifically designated the District of Columbia district court as a forum for challenges to nationwide regulations, that court would nonetheless have had jurisdiction and venue to hear such challenges under 28 U.S.C. 1331 and 28 U.S.C. 1391(e)(2). *Drummond*, 735 F.2d at 474 n.10. Thus, the specific designation of that court as a forum for such challenges reinforces the conclusion that it is the exclusive forum.

Petitioner argues that, because the House and Senate versions of Section 1276(a)(1) both provided that nationwide regulations were subject to review "only" in the District of Columbia district court, and the conference committee deleted the word "only," the final bill does not provide for exclusive jurisdiction. Pet. 12-13. The conference committee report, however, does not state why the word "only" was deleted. See H.R. Rep. No. 493, 95th Cong., 1st Sess. 111 (1977). And "[u]nexplained changes made in committee are not reliable indicators of congressional intent." *Drummond*, 735 F.2d at 474. The conference committee could have readily concluded that the specific designation of the District of Columbia district court as the forum for reviewing nationwide regulations and the use of the word "shall" were sufficient to confer exclusive jurisdiction, and that the use of the word "only" was therefore redundant. *Ibid.* Alternatively, the deletion "may have been completely inadvertent." *Ibid.*; see also *Amerikohl*, 899 F.2d at 1213-1214. Because the conference committee did not state that the deletion was intended to change

the meaning of the bill, no such intent should be imputed to Congress.

Petitioner's reliance on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is also misplaced. In that case, the Court held that, because there is a presumption of reviewability of administrative action, the fact that certain regulations were made reviewable did not support an inference that Congress intended to foreclose review of other regulations. *Id.* at 140-141. The construction of Section 1276(a)(1) adopted by the court below, however, does not foreclose judicial review of nationwide SMCRA regulations. Instead, it restricts review of such regulations to a specific forum. The principle involved in *Abbott Laboratories* is therefore inapplicable here.

b. As petitioner notes (Pet. 8), the construction of Section 1276(a)(1) adopted by the court below conflicts with the Sixth Circuit's decision in *Holmes Limestone Co.* v. *Andrus*, 655 F.2d 732 (1981), cert. denied, 456 U.S. 995 (1982). That conflict, however, does not warrant this Court's review. *Holmes* was the first appellate decision on the jurisdictional question presented here, and it was decided 15 years ago. Since *Holmes*, four circuits have addressed the jurisdictional issue, and all have expressly rejected the reasoning in *Holmes*. See *Virginia*, 741 F.2d at 41 n.5 (4th Cir.); *Amerikohl*, 899 F.2d at 1213-1214 (Fed. Cir.); *Troup*, 821 F.2d at 199 (3d Cir.); *Drummond*, 735 F.2d at 473 (11th Cir.). In that same period, the Sixth Circuit has not been asked to review a nationwide SMCRA regulation, and therefore has not had an opportunity to reexamine its decision in *Holmes* in light of the decisions from the other circuits. Given the unanimity in the circuits since *Holmes*, there is every reason to believe that the Sixth Circuit will be

willing to reexamine that decision. If that expectation is not fulfilled, and the Sixth Circuit adheres to *Holmes*, the jurisdictional question would be ripe for consideration by this Court. There is no reason, however, to review that issue now.

Petitioner asserts that, because the Sixth Circuit cited *Holmes* in *Horizon Coal Corp.* v. *United States*, 43 F.3d 234, 240 n.5 (1994), there is no prospect that the circuit conflict will be resolved absent a decision by this Court. Pet. 9. *Horizon*, however, did not involve a challenge to nationwide SMCRA regulations. Instead, it involved a suit for a refund of reclamation fees. The court held that district courts have jurisdiction concurrent with the Court of Federal Claims to resolve such suits. 43 F.3d at 239-240. The only reference to *Holmes* appears in a footnote; the reference in that footnote is not to the majority decision, but to Judge Merrit's concurring opinion; and that opinion is cited for the limited proposition that "a finding that the United States Claims Court has exclusive jurisdiction over operator reimbursement actions would work a hardship against operators by requiring them to litigate their claims in Washington, D.C., rather than in the appropriate district court." *Id.* at 240 n.5. *Horizon* therefore does not support petitioner's view that there is no prospect that the Sixth Circuit will reexamine its holding in *Holmes* should the jurisdictional issue regarding nationwide regulations arise again.

c. Petitioner contends (Pet. 9) that *B & M Coal Corp.* v. *OSM*, 699 F.2d 381 (7th Cir. 1983), and *Tug Valley Recovery Ctr.* v. *Watt*, 703 F.2d 796 (4th Cir. 1983), both permitted constitutional challenges to nationwide regulations to be maintained outside the

District of Columbia and are therefore in conflict with the decision below. There is, however, no such conflict. In *B & M*, the question presented was "whether section 518(c) of [SMCRA], which requires an escrow deposit of a proposed penalty assessment prior to a formal hearing, is unconstitutional as violative of procedural due process rights secured by the fifth amendment." 699 F.2d at 382. Without discussing the jurisdictional issue, the court upheld the constitutionality of Section 518(c). 699 F.2d at 384-385. Because *B & M* involved a challenge to the underlying statute, and because the court in that case did not even discuss the jurisdictional question, it does not conflict with the decision below.

In *Tug Valley*, the court rejected a claim that the implementation of a state law violated the Constitution, without discussing the jurisdictional question. 703 F.2d at 801-802. The Fourth Circuit subsequently held that constitutional challenges to nationwide regulations must be heard exclusively in the District of Columbia, *Virginia*, 741 F.2d at 40, and the decision below followed that holding. Pet. App. 23a-24a. Because *Tug Valley* involved a challenge to state law, and did not discuss the jurisdictional question, it does not conflict with the decision below. Even if those two Fourth Circuit decisions could not be reconciled, however, such an intra-circuit conflict would not warrant this Court's review.

2. Petitioner alternatively contends (Pet. 14-16) that its due process challenge is to the application of the ownership and control regulations rather than to the regulations themselves, and that the provision requiring challenges to nationwide regulations to be heard in the District of Columbia is therefore inapplicable. That fact-specific contention does not

raise any issue of general importance warranting this Court's review.

In any event, the courts below correctly characterized petitioner's challenge as a challenge to the regulations themselves. As the district court explained (Pet. App. 23a-24a), the regulation defining ownership and control, 30 C.F.R. 773.5, and the permit review regulation, 30 C.F.R. 773.15(b), together require a regulatory authority to deny a permit application when an applicant is linked to an outstanding violation, without examining the validity of the underlying violation. Petitioner's due process challenge to the refusal to allow an applicant for a permit to contest the underlying violation is therefore necessarily a challenge to the regulations themselves. As such, it must be heard in the District of Columbia. Indeed, a due process challenge to the regulations filed by mining industry representatives is currently pending in the D.C. Circuit, see page 2, *supra*, and will be resolved there in due course.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

THE PITTSTON COMPANY and
CLINCHFIELD COAL COMPANY,

Petitioners,

v.

BRUCE BABBITT, Secretary, United States Department of Interior, and
COMMONWEALTH OF VIRGINIA, Department of Mines, Minerals & Energy, Division of Mined Land Reclamation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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30 U.S.C. § 1276(a)(1) 1, 2, 4

PETITIONERS' REPLY MEMORANDUM

I THE CONFLICT IN THE CIRCUITS IS IMPORTANT AND SHOULD BE RESOLVED

In opposition, the Secretary acknowledges a direct conflict in the circuits on whether district courts outside the District of Columbia have jurisdiction to review the promulgation of surface mining regulations, but argues that the conflict "does not warrant this Court's review." Brief in Opp., p. 8. The reason given is that the Court of Appeals for the Sixth Circuit may one day change its mind and join the other circuits in holding that jurisdiction under 30 U.S.C. § 1276(a)(1) is exclusive, not concurrent. *Id.* pp. 8-9. And, the Secretary continues, if the Sixth Circuit Court of Appeals does not overrule *Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (1981), *cert. denied*, 456 U.S. 995 (1982), the next time the issue is before it, then this Court can grant *the Secretary's* petition for a writ of certiorari. *Id.* p. 9

It is not likely, as the Secretary contends, that the conflict among the circuits will be soon resolved. Just 14 months ago in *Horizon Coal Corp. v. United States*, 43 F.3d 234 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit rejected the government's claim that the Court of Claims had exclusive jurisdiction to hear a claim for refund of SMCRA reclamation fees. The Court of Appeals cited *Holmes* for the proposition that a finding of exclusive jurisdiction would work a hardship against coal operators by requiring them to litigate their claims in Washington, D.C., rather than in the appropriate district court. 43 F.3d at 240 n.5.

The Secretary argues that *Horizon* cannot be read as affirming the Sixth Circuit's prior jurisdictional holding in *Holmes*, because *Horizon* involved a suit for a refund of reclamation fees, not a challenge to a national rule, and the issue was whether the court had concurrent jurisdiction with the Court of Claims. Brief in Opp., p. 9. The Secretary's effort to diminish the court's favorable reference to *Holmes* misses the mark.

It is true that the jurisdictional language of 30 U.S.C. § 1276(a)(1) was not before the court in *Horizon*. However, the Sixth Circuit's policy favoring concurrent jurisdiction certainly was. In view of the fact the *Horizon* court cited and quoted *Holmes* in support of that policy, it is implausible to suggest the Sixth Circuit might reverse its interpretation of § 1276(a)(1) in a future case.

The Court should decline the Secretary's invitation to delay resolution of this important question. For almost fifteen years, national mining regulations have been freely reviewable in the Sixth Circuit, but not elsewhere. Local review should be extended to the regulated companies in other circuits or it should be prohibited everywhere.

While the Secretary attempts to diminish the importance of the jurisdictional issue, it was thought to be quite serious when the government was the petitioner in *Holmes*. In its petition for a writ of certiorari, the government told the Court that the decision in *Holmes* "jeopardizes a primary purpose of the Act," presenting an "important" and "serious" issue worthy of this Court's immediate attention. Pet. in *Watt v. Holmes Limestone Co.*, No. 81-1585, pp. 8-9.

II DISTRICT COURTS OUTSIDE THE DISTRICT OF COLUMBIA SHOULD BE HELD TO HAVE CONCURRENT JURISDICTION TO REVIEW THE PROMULGATION OF REGULATIONS

In defense of the decision below, the Secretary cites several cases for the proposition that where Congress "specifically designates" a forum for administrative review that forum is exclusive, even if Congress does not expressly state that the forum is exclusive. Brief in Opp., pp. 5-6. But the Secretary's authorities do not answer this case. Here we have a statute that expressly provides for exclusive review in some cases, but not others – and not this one.

In such circumstances, we submit that the Court is justified in applying the *Abbott* presumption in favor of unrestricted judicial review. *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967). Absent "persuasive reason for restricting access," review should not be limited. *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995).

III THE SCOPE OF ANY EXCLUSIVITY SHOULD BE DETERMINED

Even if the statute clearly gave the District of Columbia court exclusive jurisdiction to review the promulgation of regulations, this case would justify the Court's attention. The Court of Appeals for the Fourth Circuit has prohibited local challenges not only to the promulgation of regulations but also to their application. App. Pet. p. 23a; *Virginia v. Watt*, 741 F.2d 37, 40 (4th Cir. 1984), *cert. granted*, 469 U.S. 979, *cert. dismissed* (case settled), 469 U.S.

1198 (1985) (any action taken by the Secretary "in accordance with" regulations deemed immune from local review). This interpretation of the statute goes too far, effectively denying local review in an array of cases that do not involve the promulgation of regulations, but their application.

Whether 30 U.S.C. § 1276(a)(1) requires as-applied challenges to regulations to be brought in the District of Columbia is not, as the Secretary suggests, a "fact-specific" issue having no general importance. Brief in Opp., p. 11. As-applied cases are, of course, fact-specific by their nature, but whether the District of Columbia is the exclusive forum for such cases is a legal issue, not a factual one, and one of significance to the mining industry. See Amicus Brief of National Mining Association, pp. 3-4.

Finally, the Secretary states that the due process issue raised by Pittston in this case will be decided by the District of Columbia courts in other litigation now pending there. Brief in Opp., pp. 2-3, 11. As a result, the Secretary suggests that Pittston's case need not be heard. The Secretary is mistaken. The District of Columbia litigation is purely a facial challenge to the ownership or control rules. Here, by contrast, Pittston asked the court to review the Secretary's enforcement of the regulations against Pittston under a specific set of facts. The two types of cases are materially different. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294 (1981). Pittston's as-applied case should not be rejected because the regulations are subject to a facial challenge in another court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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